FILE COPY

Office-Supreme Court, U. S.
FILED
AUG 5 1949
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 234

GRANT J. COWHER,

Petitioner,

vs.

THE PENNSYLVANIA RAILROAD COMPANY,
a Corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT and BRIEF IN SUPPORT THEREOF

FRANCIS H. MONEK,
Chicago, Illinois,
Attorney for Petitioner.

EDWARD B. HENSLEE,
WALTER N. MURRAY,
MELVIN L. GRIFFITH,
Chicago, Illinois,
Of Counsel.

CHAMPLIN-SHEALY COMPANY, CHICAGO

INDEX.

PAGE

ARGUMENT 21

The Appellate Court erred in affirming the judgment of the trial court 4

(a) The evidence justified a verdict by the jury in favor of the Plaintiff 22

(b) The Trial Court erred in ruling out certain evidence offered by the Plaintiff 22-30

(c) The Trial Court erred in not giving a certain instruction asked by the Plaintiff 5-37

(d) The Appellate Court erred in upholding the rulings of the Trial Court 22-48

CONCLUSION 48

Jurisdiction to Review 3-10

Opinion of Appellate Court 10

Prayer 8

Questions Presented 4-12

Reasons for Granting of Writ 5

Specifications of Errors 20

Statement 14

Summary of Argument 13

Summary and short statement of matters involved.... 2

CITATIONS.

CASES:

Bailey v. Central Vermont R. Co., 319 U. S. 350, 63 S. Ct. 1062 3

Berry v. Baltimore and Ohio Railroad Company, 43 S. W. (2) 782 (Mo. 1931), reversed 286 U. S. 272, 52 S. Ct. 510, 76 L. Ed. 1098 (1932) 45

Bibbins v. City of Chicago, 193 Ill. 359, 61 N. E. 1030 (1901) 33

Blair v. Baltimore & O. R. Co., 323 U. S. 600, 65 S. Ct. 545 3

Buckeye Cotton Oil Co. v. Harris, 124 Ark. 14, 186 S. W. 292 (1916) 36

Chicago & Great Western Ry. Co. v. Minneapolis, St. Paul & S. S. M. R. Co., 8 Cir. 176 F. 237..... 26

Chicago R. I. & P. Ry. Co. v. Cline, 91 Colo. 255, 14 P. (2) 495 (1932) 41

Chicago Union Traction Co. v. Browdy, 206 Ill. 615, 623, 69 N. E. 570 (1903) 40

Chicago Union Traction Co. v. Miller, 212 Ill. 49, 72 N. E. 25 (1904) 36

Clark v. Union Iron and Foundry Co., 234 Mo. 436, 137 S. W. 577 (1911) 44

Coray v. Southern Pacific Co., 335 U. S. 520, 69 S. Ct. 275 3

Crossman, et al. v. Lurman, et al., 33 App. Div. 422, 54 N. Y. S. 72 (1898) 32

Damchuk v. Public Service Ry. Co., 5 N. J. Misc. R. 136, 136 Atl. 604 (1927) at p. 604 36

Donk Brothers Coal and Coke Company v. Thil, 228 Ill. 233, p. 240, 81 N. E. 857 (1907) 26

Ellis v. Union Pacific R. Co., 329 U. S. 649, 67 S. Ct. 598 3

Engen v. Rambler Copper and Platinum Co., 20 Wyo. 95, 121 Pac. 867 (1912) at p. 872 36

Foster v. Sol Greisler and Sons, Inc., 150 Pa. Super. 509, 29 A. (2) 103 (1942) at p. 107 36

Goodwin v. Barre Sav. Bk. & Trust Co., ... Vt. ..., 100 Atl. 34 (1917) 35 33
Grannon v. Donk Bros. Coal and Coke Company, 259 Ill. 350, 354, 102 N. E. 769 (1913) 43
Greenlee v. Mosnat, 126 Iowa 630, 101 N. W. 1122 (1905) 1123 36
Gunn v. New York N. H. & H. R. Co., 171 Mass. 417, 50 N. E. 1031 (1898) 36
Halloran v. Chicago and North Western Ry. Co., 327 Ill. App. 217, 63 N. E. (2) 670 (Published in abstract only, First Dist., 3rd Div., 1945) 40-46
Hogan v. Fleming, 217 Mo. 524, 297 S. W. 404..... 26
Ivanowski v. Spring Valley Coal Co., 183 Ill. App. 232 (First Dist., 1913) 26
Kuhn v. Stanfield, 111 F. (2d) 469 (C. C. A. 8th 1940) 29
Lavender v. Kern, 327 U. S. 645, 66 S. Ct. 740..... 3
Lewis, et al. v. Englewood Elevated R. Co., 223 Ill. 223, 79 N. E. 44 (1906) 36
Loloff v. Sterling, 31 Colo. 102, 71 Pac. 1113 (1903) at p. 1115 35
Miles v. St. Louis I. M. T. S. Ry. Co., 38 Ark. 485, 119 S. W. (1909), p. 839 32
Moss v. Wells, ... Mo. ..., 249 S. W. 411 (1923) at p. 412 37
Murphy v. American Barge Line, 76 F. Supp. 276 (D. C. W. D. Penn., Mar. 4, 1948) 28
Nichols & Shepard Co. v. Horstad, et al., 33 S. D. 370, 146 N. W. 566 (1914) at p. 567 36
Niemann v. Garcia, 144 S. W. (2) 621 (Tex. Civ. App.) (1940) at p. 623 34
North Chicago Street Ry. Co. v. Irwin, 202 Ill. 345, 66 N. E. 1077 (1903) 26
Pierce v. Farrar, et al., 60 Tex. Civ. App. 12, 126 S. W. 932 (1910) 31
Rost v. F. H. Noble & Co., 316 Ill. 357, 147 N. E. 258 (1925) 36
Roswell v. Ross, et al., 89 Conn. 201, 93 Atl. 236 (1915) at pp. 237-8 34

Skidmore v. B. & O. Ry. Co., 167 F. (2d) 54 (C. C. A. 2d, March 5, 1948) 47
State ex rel. v. Ellison, 283 Mo. 532, 223 S. W. 651.. 45
Sturm v. Consolidated Coal Co., 248 Ill. 20, 93 N. E. 345, 21 Ann. Cas. 99 (1910) 25
Tallman v. Nelson, 141 Mo. App. 478, 25 S. W. 1181 (1910) at p. 1184 36
Tennant v. Peoria & P. U. R. Co., 321 U. S. 29, 64 S. Ct. 409 3
Terminal R. Assn. of St. Louis v. Scharb, 151 F. (2d) 361 (C. C. A. 8th 1945), cert. den. 326 U. S. 786, 90 L. Ed. 477 (1946) 26
Texas & P. Ry. Co. v. Presley, 152 S. W. (2) 1105 (Tex. 1941) 42
Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54, 63 S. Ct. 444 3
Vandalia R. Co. v. Kendall, 68 Ind. App. 1, 119 N. E. 817 (1918) 44
Whitman v. McComas, 11 Idaho 564, 83 Pac. 604 (1905) at p. 605 35
Wilkinson v. McCarthy, 336 U. S. 53, 69 S. Ct. 413.. 3
Williams v. Terminal R. Assn., 20 S. W. (2) 584 (Mo. 1929) 44

STATUTES.

45 U. S. C. A., Sec. 51-60 3-5-10-11
Title 28 U. S. C. A., Sec. 1257, Par. 3 3-10

TEXTS.

38 American Jurisprudence 1015 29
151 A. L. R. 324, 340 26
25 C. J. S. 125 26

RULE.

12 of Illinois Sup. Ct. 21

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No.

GRANT J. COWHER,

Petitioner,

vs.

THE PENNSYLVANIA RAILROAD COMPANY,
a Corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Supreme Court of the United States:

The Petitioner, GRANT J. COWHER, respectfully petitions this Honorable Court as follows:

1. To review the judgment of the Appellate Court of Illinois, First District, in the above case, which was entered December 30, 1948, and became final upon the denial of Petition for Leave to Appeal from the Appellate to the Supreme Court of Illinois, May 12, 1949.

2. For a Writ of Certiorari to the Appellate Court of Illinois, First District, for that purpose.

In this behalf Petitioner shows:

I.

Summary and Short Statement of the Matter Involved.

This suit was brought by Petitioner in the Superior Court of Cook County, Illinois, against THE PENNSYLVANIA RAILROAD COMPANY [1] under the Federal Employers' Liability Act [2] to recover damages for injuries received by Petitioner as an employee of Respondent on February 1, 1945, caused by the negligent failure of the Respondent to make his place of work reasonably safe (R. 69).

The case was tried before a jury who returned a verdict finding the Defendant not guilty.

Motion for a new trial was made and overruled, and judgment entered on the verdict (R. 318).

Petitioner appealed from the judgment to the Appellate Court of Illinois, First District.

Petitioner argued on appeal that the Trial Court erred in excluding certain evidence offered by the Petitioner and that the weight of the evidence was in his favor, but that the rulings of the trial judge on the admission of evidence and on a requested instruction, caused the jury to return a verdict for Respondent.

The Appellate Court upheld the Trial Court's action in these respects and affirmed the judgment.

Petition for a rehearing was filed and denied (R. 320).

Petition for Leave to Appeal from the Appellate to the Supreme Court was filed (R. a) and denied (R. 332).

---

1 Hereinafter referred to as "Pennsylvania".

2 35 Stat. 65, 45 U. S. C. A., Secs. 51-60.

Petitioner contends that in reaching its conclusion, the Appellate Court deprived the Petitioner of a fair trial by jury and deprived him of the benefit of certain evidence which he was entitled to have the jury hear in its proper order and deprived him of his right to have the jury properly instructed, in a case in which the undisputed facts strongly supported the Petitioner's case, and thereby the Court ruled contrary to the provisions of the Federal Statute, 45 U. S. C. A., Secs. 51-60, and the principles of law announced by this Court in *Wilkerson* v. *McCarthy,* 336 U. S. 53, 69 S. Ct. 413; *Coray* v. *Southern Pacific Co.,* 335 U. S. 520, 69 S. Ct. 275; *Ellis* v. *Union Pac. R. Co.,* 329 U. S. 649, 67 S. Ct. 598; *Lavender* v. *Kurn,* 327 U. S. 645, 66 S. Ct. 740; *Bailey* v. *Central Vermont R. Co.,* 319 U. S. 350, 63 S. Ct. 1062; *Tiller* v. *Atlantic Coast Line R. Co.,* 318 U. S. 54, 63 S. Ct. 444; *Tennant* v. *Peoria & P. U. R. Co.,* 321 U. S. 29, 64 S. Ct. 409; *Blair* v *Baltimore & O. R. Co.,* 323 U. S. 600, 65 S. Ct. 545.

II.

Jurisdictional Statement.

This Court's jurisdiction is invoked under Title 28 United States Code, Judiciary and Judicial Procedure, Section 1257, Paragraph 3, Public Law 773, 80th Congress, 67, effective September 1, 1948.

The judgment to be reviewed is a final judgment rendered by the highest Court of the State of Illinois in which a decision could be had under Illinois law making an Appellate Court judgment final upon denial by the Supreme Court of Petition for Leave to Appeal from the Appellate Court to the Supreme Court of Illinois.

The judgment is a decision involving rights, privileges and immunities specially set up or claimed by Petitioner

under a United States Statute, The Federal Employers' Liability Act, 35 Stat. 65 (45 U. S. C. A., Secs. 51-60), April 28, 1908, as amended.

III.

The Questions Presented.

The ultimate questions to be decided in this case are:

1. In this case, involving rights under the Federal Employers' Liability Act, did the Appellate Court err in affirming the judgment of the Trial Court?

2. Was there sufficient evidence before the jury to show the Respondent guilty of failing to furnish the Petitioner reasonably safe instrumentalities, including a reasonably safe place in which to do his work?

3. Was the Respondent guilty of negligence in ordering the Petitioner into an unsafe place to do his work?

4. Was Petitioner's right to a fair and impartial trial prejudiced by the action of the Trial Court in refusing to admit evidence of custom and practice when offered by Petitioner on his case in chief, although such evidence was adduced through examination and re-cross examination of Respondent's witnesses, particularly in view of instructions to the jury not to consider evidence which the Court had refused to admit or which had been stricken out by the Court?

5. Did the Trial Court err in refusing to give the following instruction asked by Petitioner?

> "If you believe from a preponderance or greater weight of the evidence that the box car in question was at the time in question covered with snow and ice and that Defendant knew, or in the exercise of ordinary care should have known that the snow and ice, if any,

was there and knew, or should have known that its presence rendered it dangerous for a man to go upon and ride said car; and if you further find from the preponderance of the evidence that Plaintiff went upon the box car in question in the course of his employment at the order and direction of Defendant's conductor and that said conductor had authority to give such order and direction, if any; and if you further find and believe from the preponderance of the evidence that the condition of said car by reason of the presence of the snow and ice, if any, was such that a reasonably prudent person in the position of said conductor would not have ordered Plaintiff to go upon the car, and if you further find from a preponderance or greater weight of the evidence that the accident and injury to the Plaintiff was the direct and proximate result, in whole or in part, of obeying the conductor's order, if any, then you should consider this together with all of the facts and circumstances proved by a preponderance of the evidence in arriving at your verdict. (Refused.)"

6. Did the Appellate Court's affirmance of the Trial Court judgment deprive the Petitioner of his right to a trial wherein all the evidence bearing upon Plaintiff's case was properly admitted under proper instructions?

IV.

Reasons Relied Upon for Allowance of the Writ.

It is alleged in the Complaint (R. 42), and admitted in Pennsylvania's Answer, that Petitioner was an employe of Pennsylvania, and that at the time of the accident both Petitioner and Pennsylvania were engaged in interstate commerce (R. 49).

Section 1 of the Act, as amended in 1939,[3] among other things, provides:

[3] 53 Stat. 1404, 45 U. S. C. A., Sec. 51.

"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth, shall, for the purposes of this Chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this Chapter."

The Appellate Court in its opinion said (R. 13):

"On the trial and in the proof the custom in its whole scope, operation and effect was admitted. Nothing occurred in the presence of the jury that would suggest to the jury that the court considered proof of the custom not to be proper. Nor did anything happen by way of argument or colloquy to suggest that the existence of the custom was in any way questioned. *There was no controversy as to the existence of the custom.* * * *" (Italics ours.)

Petitioner on his case in chief sought to prove the custom and practice followed in classifying cars at the hump. It would have appeared from the offered evidence that the usual custom and practice were violated and that this violation contributed to cause the accident.

The Court refused to admit or struck out such evidence on the theory that Petitioner had not pleaded custom and practice. The Court instructed the jury as follows (R. 311):

"Whenever the court uses the word 'evidence' in these instructions the court means evidence which has been admitted by the court and has not been stricken out of the record. The jury must not consider any remark or statement made by attorneys, which are not supported by the evidence or by the law, as given in these instructions. Any evidence that has been admitted and was afterwards stricken out by order of the court must be wholly disregarded the same as if it had not been heard, and the jury must not be influenced by any remarks or statements of counsel or

witnesses, which were heard by them and which were afterwards stricken out of the record by order of the court, and you must not draw any inference from any remarks or statements made during the progress of this trial by anybody where such remarks or statements were afterwards stricken from the record by order of the court. (Given 5.)"

This evidence was partly adduced from Respondent's witnesses through examination and re-cross examination of Respondent's witnesses who were produced to testify on behalf of Respondent.

The Appellate Court held that since the evidence as to custom and practice was thus received and since there was no dispute about it, there was no error in refusing the evidence when offered by Petitioner on his case in chief.

Petitioner contends that in view of the quoted instruction, the jury, in all probability, never considered this vital point in Petitioner's case.

The Court also refused to give Petitioner's instruction offered in support of his theory of his case that he was ordered by his superior into an unsafe place in which to perform his duties (R. 307).

The Court, by its rulings on the offers of proof as to custom and practice and in refusing to give the instruction embodying Petitioner's theory of the case, deprived Petitioner of a fair and impartial trial.

1. It was proper for the Petitioner to prove this custom or practice.

2. It was error for the Court to refuse to permit the Petitioner to prove this custom or practice while proving his case.

3. This error was not cured by part of this custom being proved on re-cross examination of Defendant's witnesses.

The Appellate Court said (R. 14):

"We are of the opinion that *substantially* all of the excluded evidence was later presented to the jury."

4. The verdict was contrary to the weight of the evidence had all of the evidence been considered by the jury.

5. The Trial Court erred in refusing to give the instruction to the jury on the theory of Petitioner's case.

The jury evidently got the idea that custom and usage had no place in this trial from the repeated rulings of the trial judge.

Petitioner's duties were determined by the order of his superior to "get up on that car" (R. 88). His duties required him to ride cars off the hump (R. 76). There is no evidence in the record that he failed to perform any duty growing out of his task. There is no question but that the place in which he was ordered to work was dangerous (R. 88).

From all this evidence, the jury could and undoubtedly would have found a verdict for the Petitioner had it not been for the ruling of the trial judge on custom and practice and on the instruction of the Petitioner.

For these reasons this Court, in the exercise of its power of supervision over State Courts where Federal rights are involved, should grant this Petition and review and reverse the Trial and Appellate Court judgments and order a new trial of the case.

Prayer.

Wherefore, for the reasons above given, Petitioner respectfully prays that a writ of certiorari be issued to the Appellate Court of Illinois, First District, to the end that

this cause may be reviewed and determined by this Court and that the judgment of the Appellate and Superior Courts of Illinois be reversed and remanded with direction that a new trial be granted, and for such other and further relief as to the Court shall seem just.

FRANCIS H. MONEK,
Attorney for Petitioner.

EDWARD B. HENSLEE,
WALTER N. MURRAY,
MELVIN L. GRIFFITH,
Of Counsel.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion Below.

Cowher v. *The Pennsylvania Railroad Company*, 336 Ill. App. 308, 83 N. E. (2nd) 359 (Abstract only); R. 1-19 (Opinion in full).

II.

Jurisdictional Statement.

This court's jurisdiction is invoked under Title 28 United States Code, Judiciary and Judicial Procedure, Section 1257, Paragraph 3, Public Law 773, 80th Congress 67, effective September 1, 1948.

The judgment to be reviewed is a final judgment rendered by the highest Court of the State of Illinois in which a decision could be had under Illinois law making an Appellate Court judgment final upon denial by the Supreme Court of Petition for Leave to Appeal from the Appellate Court to the Supreme Court of Illinois.

The judgment is a decision involving rights, privileges and immunities specially set up or claimed by Petitioner under a United States Statute, The Federal Employers' Liability Act, 35 Stat. 65 (45 U. S. C. A., Secs. 51-60) April 28, 1908, as amended.

Statutes Involved.

1. Every common carrier by railroad while engaging in commerce between any of the several states * * *, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, * * * for such injury, * * * resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.[4]

2. Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

* * *

By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.[5]

---

[4] 35 Stat. 65, Sec. 1; 53 Stat. 1404, Sec. 1; Title 45 U. S. C. A., Sec. 51.

[5] Section 1257, Public Law 773, 80th Congress, 67.

III.

The Questions Presented.

The ultimate questions to be decided in this case are:

1. In this case, involving rights under the Federal Employers' Liability Act, did the Appellate Court err in affirming the judgment of the Trial Court?

2. Was there sufficient evidence before the jury to show the Respondent guilty of failing to furnish the Petitioner reasonably safe instrumentalities, including a reasonably safe place in which to do his work?

3. Was the Respondent guilty of negligence in ordering the Petitioner into an unsafe place to do his work?

4. Was Petitioner's right to a fair and impartial trial prejudiced by the action of the Trial Court in refusing to admit evidence of custom and practice when offered by Petitioner on his case in chief, although part of such evidence was adduced through examination and re-cross examination of Respondent's witnesses, particularly in view of instructions to the jury not to consider evidence which the Court had refused to admit or which had been stricken out by the Court?

5. Did the Trial Court err in refusing to give the following instruction asked by Petitioner?

> "If you believe from a preponderance or greater weight of the evidence that the box car in question was at the time in question covered with snow and ice and that Defendant knew, or in the exercise of ordinary care should have known that the snow and ice, if any, was there and knew, or should have known that its presence rendered it dangerous for a man to go upon and ride said car; and if you further find from the preponderance of the evidence that Plaintiff went upon the box car in question in the course of his employment

at the order and direction of Defendant's conductor and that said conductor had authority to give such order and direction, if any; and if you further find and believe from the preponderance of the evidence that the condition of said car by reason of the presence of the snow and ice, if any, was such that a reasonably prudent person in the position of said conductor would not have ordered Plaintiff to go upon the car, and if you further find from a preponderance or greater weight of the evidence that the accident and injury to the Plaintiff was the direct and proximate result, in whole or in part, of obeying the conductor's order, if any, then you should consider this together with all of the facts and circumstances proved by a preponderance of the evidence in arriving at your verdict. (Refused.)"

6. Did the Appellate Court's affirmance of the Trial Court judgment deprive the Petitioner of his right to a trial wherein all the evidence bearing upon Plaintiff's case was properly admitted under proper instructions?

IV.

Summary of the Argument.

There is sufficient evidence in the record to have warranted a verdict for the Petitioner.

There would have been more evidence in the record if the Trial Court had permitted the Petitioner to introduce testimony as to custom and practice.

The fact that part of the rejected evidence got before the jury in the re-cross examination of Respondent's witnesses did not cure the error of the trial judge in excluding it when offered by the Petitioner while presenting his case.

The Petitioner was entitled to have the jury properly instructed as to his theory of the case. His instruction on his theory was tendered and denied by the Trial Court. No other instruction was given on his theory.

V.

Statement of Facts.

Petitioner, aged thirty, was working for the Respondent as a yard brakeman in the Respondent's classification yard at Altoona, Pennsylvania (R. 76). This position required him to ride cars off the hump for the purpose of classifying them.

A hump is a steep hill over which an engine pushes cars of mixed destination and as each car reaches the top of the hill from one side, a rider mounts the car, tests his brakes, and, if he finds the car safe to ride, he signals the pin puller on the ground who then cuts that car loose from the train and the car is allowed to drift down the other side of the hump by gravity. The brakeman controls the speed of the car by means of the hand-brake situated on the top and end of the car.

As the car rolls down the track, it is switched automatically so that it eventually reaches a track onto which come all cars being shipped to a similar destination.

February 1, 1945, at about 11:55 P. M., Petitioner was injured while so classifying cars. He had started work at 3:00 P. M. and, after finishing eight hours of work, continued working another eight hours immediately, making a working day of sixteen hours.

This was a cold, dark night and there was ice and snow about the yard to a depth of about six inches. It had not snowed for a number of days in this locality. The snow had melted and frozen again leaving a dirty, icy crust on the top (R. 121). None of the cars Petitioner had previously ridden that night had ice and snow on them (R. 96, 122).

The hump on which Petitioner was working had two tracks running from east to west over the hump hill. The tracks were about ten feet apart and on each side were looked down upon by the yard master's office and the conductor's tower so that the tracks ran between these two buildings which were about twenty-five feet apart (R. 78). The tracks are connected by a crossover track. The north track was designated as No. 2 track and the south track was called No. 1 track. As cars were pushed over the hump, the engine was at the west end pushing east and the cars on the apex of the hump were at the east end of the train (R. 78).

The crossover track connects with a third track called a slide track which was located just north of No. 2 track. On this slide track are placed cars that are cut out of the humping train and not ridden down by riders because such cars are found unsafe to ride (R. 77).

At the top of the hump adjacent to Track No. 1 is a two-story office building facing toward the two tracks. This building was located about four feet south of the nearest rail of Track No. 1. The second story of this building was the office of the yardmaster who is the superior in charge of the hump. His office, by means of open-window apertures, looks down upon the cars being ridden over the hump. These windows are located four feet over the tops of the cars and four feet to the side of them (R. 77). In this office with the yardmaster are two switchmen who operate the buttons automatically switching the cars as the riders ride them down the hump by gravity (R. 77).

Directly across from the yardmaster's office is the conductor's tower which is two stories high. Its windows are about four feet over the tops of the cars moving on the hump tracks. The cars are approximately eighteen to twenty feet high (R. 78).

From these openings the conductor faces both the tracks and the yardmaster's office and he is able to look directly down on the cars and their riders and can see the engine at the west end (R. 78, 79).

The conductor is always in the tower controlling movements of the train, directing the riders (R. 79, 26), and stopping and starting the train when the hump runs out of riders or when bad cars have to be taken out (R. 79) because they are unsafe to ride down.

The hump conductor was in complete charge of the operation of the hump (R. 262-264). Usually, however, there are two conductors on the hump supervising the movement; one is in the tower (R. 279) and another on the ground whose duty it is to see that the riders are on the brake platform of the cars before being cut off (R. 280).

There are a number of lights so arranged on the yardmaster's building that in the night time they illuminate the top of the hump and shine on the tops of the cars (R. 277) being pushed between the yardmaster's office and the conductor's tower.

Both the conductor and the yardmaster could look down upon the Petitioner and had a clear and uninterrupted view of the tops of the cars and could see the condition of the cars he was about to ride (R. 78, 79). Another official located on the hump was a safety man whose duty it was to see that all cars were safe to ride (R. 78).

To the west or ascending side of the hump, cars being classified passed over pits between the rails of the track (R. 87) in which pits car inspectors examined the cars as they came into the yard (R. 293) and passed overhead. They merely inspected the underside of the cars, however, and not the roofs (R. 294).

In riding cars off the hump the brakemen mount the car at the brake end, climb the side ladder, cross over to the end ladder and onto the brake footboard. All box cars, except possibly one out of a hundred, are equipped with brake footboards or platforms (R. 89). The footboard is a platform upon which the brakeman stands in operating the hand brake which consists of a horizontal wheel or a vertical shaft. The platform is situated at the end of the car and about two feet below the roof. When a brakeman is standing on this platform the wheel of the handbrake is about two feet above the car or about waist high to the brakeman (R. 79). If, after checking his brake, the platform, and his general working location, the brakeman finds the car safe to ride, it is cut off from the train (R. 79).

At about 11:15 P. M. Petitioner rode a coal hopper car off the hump to its destination in the yard and he was conveyed back to the hump on a dilly or pick-up car which he rode with three or four other brakemen. When he reached the hump, he walked in the lead toward Track No. 1 (R. 87-88) upon which a train just in from the mountains was being classified over the hump. As Petitioner neared the track, the conductor, from his vantage point four feet over the cars in the tower, hollered to the Petitioner "Get on that car" (R. 88-123), indicating the leading car which was already moving at that time (R. 88) but was still attached to the train (R. 123-124). Petitioner caught the car at the side ladder at the trailing end (R. 126) and in doing so almost slipped off due to ice on the ladder rungs (R. 124). After Petitioner had climbed up the side ladder about three steps, his car was cut off from the train (R. 96) and started to drift down the hump by gravity (R. 88).

As Petitioner climbed up the side ladder (R. 126), he then changed over to the end ladder at the end of the car and attempted to step onto the place where the brake plat-

form is customarily located. He thereupon found that this car had no brake platform (R. 88), although ninety-nine out of a hundred have one (R. 89). It then became necessary for him to control the movement of this car by operating its hand brake from the roof of the car.

The ladder going up was slippery and covered with ice (R. 124). When Petitioner reached the top, he noticed that the roof was likewise covered with ice and snow. As there was no brake platform upon which to stand in operating the handbrake (R. 89), Petitioner sat down on the roof to operate the brake (R. 90). The roof was covered with dirty crusted snow to a depth of three inches and there were footprints in the snow indicating someone had previously walked over the catwalk of the car.

The handbrake of a car has a dog or ratchet which is a gear engaging device located on the brake platform to prevent the brake from unwinding. It is operated by the foot of the brakeman while winding the brakewheel by hand. As this car had no platform, the ratchet was on the roof of the car about two feet below the handwheel. Petitioner had a brake club about three feet long (R. 94) which he used to wind the brake with one hand while engaging the dog or ratchet with the other hand (R. 90, 91).

Brakemen riding a car are customarily allowed to reach the brake platform and try the handbrake before being cut off and, if the car is for any reason unsafe, it is customary to stop the train on his signal and cut off the car coupled with a safe car behind it allowing the brakeman to take the unsafe car to its destination by means of the handbrake of the second or safe car. A yard engine then picks up the second car if it doesn't belong on the same track with the unsafe one (R. 264). On other occasions the unsafe car is merely pushed onto the slide track on the top of the hump

by means of the crossover track (R. 77) and is not allowed to be ridden down.

Before Petitioner could reach the roof and try his hand-brake and see if the car was otherwise safe to ride, however, his car was cut off from the train and started to drift down the hump by gravity (R. 88). Petitioner had given no signal that he was prepared to be cut off (R. 95).

Petitioner's car went down the hump at about fifteen or twenty miles per hour and Petitioner rode the car about forty car lengths or 2,000 feet and stopped it at its destination in a place where it was very dark (R. 91). He had no lantern or light to illuminate his way in the darkness in getting off the car (R. 95).

Petitioner is six feet, three inches tall (R. 9). He had to crawl on his knees over the ice and snow on the roof to the side ladder to get off (R. 92, 126). As he placed his feet in the top rung of the side ladder and tried to secure a hold on the grab iron located on the roof of the car about sixteen inches from the edge, he was carrying his three foot long brake club (R. 94) and he was in a crouched position (R. 126). He was unable to obtain a hold on the roof grab iron as there was three inches of icy snow all around it (R. 23). This grab iron normally is elevated two inches over the roof. The top rungs of the side ladder were likewise covered with ice (R. 22). Suddenly Petitioner's feet slipped off the ice and, being unable to grab the roof grab iron, Petitioner fell to the ground (R. 21) about fifteen feet below (R. 98) landing in a sitting position on his left hand and right hip (R. 93).

Both his left hand and his right hip felt broken and he was intermittently unconscious. Finally he was assisted to the hump where a statement was taken from him as to the occurrence (R. 93, 94). Petitioner was taken to a hospital,

his hand was repeatedly casted, he underwent two major operations which removed a number of bones from his left hand, being operated on first on June 23, 1945 (R. 102), and again in January, 1946 (R. 104), leaving him with a wrist that, at the time of trial two years after the accident, had very little motion or sensation. It caused him constant pain, prevented him from lifting anything (R. 105), and had deep scars knitted to the underlying tendons (R. 115). He also sustained a serious back injury (R. 138-157) about which he never complained, however, due to the constant pain in his wrist (R. 103).

At a company investigation on February 13, 1945 (R. 281) in the trainmaster's office (Abst. 54) about twelve days after the accident, the Petitioner was required to make another statement which he signed and in which he attributed his accident to the snow and ice on the car (R. 303, 304) and Defendant's Exhibit 1 (R. 283).

The hump conductor admitted he saw Petitioner on the car but didn't remember exactly where he was on the car. The car passed immediately in front and below him (R. 261). The cars on the hump were brightly illuminated from above (R. 261). It was his duty to check the condition of the cars the men are about to ride but he did not recall if there was snow or ice on the car (R. 260, 261).

VI.

Specifications of Errors to be Urged.

The Appellate Court of Illinois, First District, erred:

1. In refusing to admit evidence of the practice and custom in classification of cars at the hump when offered by Petitioner on his case in chief.

2. In holding that the introduction of a part of the evidence of custom and practice on re-cross examination cured the error of the Trial Court in refusing to admit or in striking such evidence from the record on Petitioner's case in chief.

3. In refusing to give Petitioner's requested instruction on the theory of his case.

4. In affirming the judgment of the Trial Court instead of reversing the case and ordering a new trial.

VII.

Argument.

I.

The cause of action, as stated in the Complaint, was the failure of the Respondent, to furnish Petitioner a reasonably safe place in which to do his work, and in failing to follow certain customs and practices that had theretofore been followed in the handling of cars.

The Complaint broke this negligence down into five different breaches of duties in accordance with Rule 12 of our Supreme Court:

a. It unnecessarily permitted a great amount of snow and ice to be and to remain upon the grab irons and the top of said car where Petitioner had to work, when it knew, or in the exercise of ordinary care should have known, that said ice and snow was there for a long time and that it would endanger Petitioner in the performance of his duties on said car.

b. It failed to use ordinary care to furnish Petitioner with a reasonably safe place in which to work.

c. It failed to use ordinary care to furnish the Peti-

tioner with reasonably safe instrumentalities with which to work.

d. It negligently directed and ordered Petitioner to ride said car, when it knew, or in the exercise of ordinary care should have known, that it was covered with snow and ice and that the presence of said snow and ice coupled with the absence of a brake platform from which to operate said car increased the hazard and danger to the Petitioner in operating said car.

e. It failed to couple said car to another car with a brake platform from which Petitioner could have operated the hand brake and taken said car to its destination, when it knew, or in the exercise of ordinary care should have known, that to require the Petitioner to operate the hand brake from the roof of said car when it was covered with ice and snow which increased the hazard to Petitioner would endanger his safety.

In order to prove the negligence charged Petitioner was permitted to introduce certain evidence which showed that:

a. Other employees of the Respondent, whose duty it was to direct the movement of trains and cars were at their places of duty (Opinion 3 and 4).

b. At the time just before the accident Petitioner was ordered by the conductor to "get on that car" (Opinion 4). This was by an employee of the Respondent, whose duty it was to give said orders and who knew it was a dangerous place.

Under these facts it became proper and necessary for the Petitioner to show the *custom and practice* that existed and was followed under such circumstances. In order to do so he offered to prove such custom and practice (R. 81 to 87, 90, 94, 95, 96, 97, 108, 109, 128, 275, 279). All these offers,

some in the presence of the jury and some in chambers, were denied. They were proper offers under the decided cases. The custom sought to be proved was competent and not denied by the Respondent. The Court in the above opinion says: "There was no controversy as to the existence of the custom" (R. 13). This being so, it was proper to be introduced in evidence. It was excluded *every time it was offered.* The opinion also says: "Nothing occurred *in presence of the jury* that would suggest to the jury that the court considered proof of the custom not to be proper" (R. 13). This is not true. The evidence was proper and should have been admitted *when offered.* In reply to the above remark of the Appellate Court we call attention to the following in the record and insist that it is enough to indicate to the jury that the court thought the evidence of custom was not admissible.

1. The first attempt to prove custom was in the examination of Petitioner (R. 81). The Court *in the presence of the jury* sustained objection to the witness testifying to customs as to the riding of cars and what was done when a car was found unsafe. The jury then retired and Petitioner made his offer out of its presence to prove that it was the custom to ride cars over the hump and if they were found unsafe to notify the pin cutter who would then cut off two cars and tell the rider to go upon the brake platform of the second car and take the two cars to the destination of the first car, that this was the customary practice and that it was always done. The yard engine would then pick up the second car and take it where it belonged. Petitioner was not allowed to follow this custom but was ordered to get on that first car and the car was cut off before he had an opportunity to see if it was safe to ride as was the custom.

Mr. Costello (R. 83) objected to proof of this custom. The Court sustained this objection and refused to allow Petitioner to present any of these matters to the jury.

2. An attempt was made (R. 84) to show how many cars were ridden by the Petitioner on other occasions. On objection by Mr. Costello, this custom was not admitted by the Court. *The jury was then present.*

3. The Petitioner was asked, "State whether it is customary for a man to ride a car off a hump to give a signal when he is about to be cut off." Mr. Costello objected. The Court sustained the objection. *The jury was present* (R. 92).

4. The same thought, put in other words was offered and objected to and the Court made the same ruling (R. 93). *The jury heard this.*

5. An attempt was made to show what type of work the brakemen were accustomed to do, etc. Objection was made and sustained (R. 109). *The jury was present.*

6. In chambers, out of the presence of the jury, Petitioner's attorney offered to produce witnesses to prove three things as follows:

a. That the brakemen ride sometimes two or three cars joined together off the hump (Custom).

b. That the brake platform on these box cars is approximately 2 to 2½ feet from the top of the car, and that the shaft runs through that brake platform and there is a wheel about 2 feet over the top of the car so that when one stands on the brake platform the brake wheel is about waisthigh and when he leaves the platform he makes merely one step over to the left of the car from which he can step on the side ladder and step on down (Custom).

c. That more than one car is frequently ridden off

by brakemen and these cars are coupled together and to show the strength that is required of a man in order to stop a car or cars that are being taken off the hump (Custom).

After these offers were made objection was made and sustained to each of them and Petitioner was prohibited from offering such testimony to the jury (R. 112).

7. The Petitioner was asked, "Which ladder, the end ladder or the side ladder, is customarily used by hump riders in getting off the top of a car after riding the car to destination?" Same objection and same ruling. *The jury heard this* (R. 128).

On cross-examination of the witness Chatham, Mr. Monek on objection of Mr. Costello, was prevented from showing what the custom and practice was if a brakeman was cut off before he had a chance to get to the platform and test his brake (R. 264). *This was in the presence of the jury.*

Again on cross-examination of the same witness Mr. Monek asked: "Isn't it customary to allow a man to get up to the brake, test the brake and see if it is safe before he gets off the hump?" Mr. Costello objected and the Court again sustained the objection (R. 279). *The jury again heard this.*

There were several other offers made of the custom and practice that had theretofore prevailed and the Court, in each case, sustained objections thereto. In its opinion the Appellate Court says nothing occurred that would influence the jury. The jury was thus led to believe that the Court was of the opinion that custom and practice had no place in this trial.

The principle of proving custom and practice has been affirmed in *Sturm* v. *Consolidated Coal Co.*, 248 Ill. 20, 93 N. E. 345, 21 Ann. Cas. 99 (1910) and is made the subject

of an exhaustive and approving annotation in 151 A. L. R. 324, 340.

It was clearly prejudicial error to refuse to allow Petitioner to prove the custom and practice as a part of his case. The result was that the jury was allowed to consider only a portion of Respondent's conduct instead of the whole of it in determining whether Petitioner had proved negligence as the cause, "in whole or in part," of his injuries.

That evidence of custom and practice is competent is supported by the following cases, even where not pleaded:

Donk Brothers Coal and Coke Co. v. *Thil,* 228 Ill. 233-240, 81 N. E. 857 (1907).

Ivanowski v. *Spring Valley Coal Co.,* 183 Ill. App. 232, First District (1913).

North Chicago Street Ry. Co. v. *Irwin,* 202 Ill. 345, 66 N. E. 1077 (1903).

The identical proposition is found in a more recent and analogous railroad case: *Terminal R. Assn. of St. Louis* v. *Scharb,* 151 F. (2) 361 (C. C. A. 8th, 1945), cert. den. 326 U. S. 786, 90 L. Ed. 477 (1946).

The Court in holding such evidence admissible stated:

> "The general rule is that where a custom is merely incidental and is relied on only as evidence of some other fact in issue, it need not be pleaded. 25 C. J. S., Customs and Usages 32, p. 125, and cases cited under Note 11.
>
> "Where a custom is merely evidentiary of defendant's negligence and is not substantive, it is not required to be pleaded. *Hogan* v. *Fleming,* 217 Mo. 524, 297 S. W. 404.
>
> "Where a custom is merely evidentiary of defendant's negligence and is not substantive, it is not required to be pleaded.

"In *Chicago Great Western Ry. Co.* v. *Minneapolis, St. Paul & S. S. M. R. Co.*, 8 Cir., 176 F. 237, 20 Ann. Cas. 1200, this court held that in the case of a doubtful act, evidence of the ordinary practice and usual custom of ordinarily prudent persons under similar circumstances is admissible on the issue of negligence in the performance or omission of the act. The court, 176 F. at page 242 said: The presumption was, as has already been said, that these operators were of ordinary intelligence and prudence. The best test of reasonable care in a given case is evidence of the degree of care which such persons commonly exercise under similar circumstances where such evidence is available. Hence, upon the question of negligence or none, evidence of the ordinary practice and of the uniform custom, if any, of such persons in the performance under similar circumstances of acts like those which are alleged to have been done negligently, is generally competent evidence, because it presents to the jury a correct standard for the determination of the issue."

It was argued in the trial and Appellate Courts that there was no controversy as to the existence of the custom. It was found by the Appellate Court that, "There was no controversy as to the existence of the custom" (R. 13). We ask then why did the trial Court persistently rule it out? If it was proper evidence of the custom it should have been permitted.

The Appellate Court says that "the subsequent admission of such proferred evidence *cured the error*" (R. 13). The opinion then says, "We are of the opinion that *substantially* all of the excluded evidence was later presented to the jury" (R. 13). It is to be noted that the Appellate Court did not say that *all* this excluded evidence was afterward given the jury. The most it could say was that *substantially* all was presented.

It is our contention that even if it had *all* been brought out on re-cross examination that the error of its exclusion would not have been cured. The jury were already influenced by the repeated rulings of the trial court on this question.

In the case at bar, the Respondent's frequent objections to the facts of the usual safe practice choked off the Petitioner's evidence almost in its entirety.

In *Murphy* v. *American Barge Line Co.*, 76 F. Supp. 276 (D. C. W. D. Penn., March 4, 1948), there was an action under the Jones Act which is the same as the Federal Employers' Liability Act except that it applies to seamen. There, as here, the Petitioner sued Respondent for almost parallel acts of negligence which allowed an icy condition of the deck of a ship to injure the Petitioner. A verdict there, as here, was brought in for the Respondent and the sole question on motion for new trial was the propriety of excluding evidence of the *usual custom and practice.* It is apparent the situation is identical with the case at bar. The Court said:

> "The reason relied upon by plaintiff for a new trial in his motion, is that the Court erred in excluding evidence as to the custom or the practice in the industry, etc.
>
> • • •

"Plaintiff offered to prove at the trial that it was the custom and duty of a watchman to inspect the barge for safety and if there are any icy conditions or other conditions rendering it unsafe, it is the duty of the watchman to correct the unsafe conditions before permitting his subordinate deckhands to go to work on the barge; and the failure of the watchman in this case to carry out that duty is a ground of negligence. Defendant objected thereto and the objection was sustained by the Court.

"In 38 American Jurisprudence 1015, it is stated: 'The degree of care which is required of a person either to prevent injury to another or to protect himself is reasonable care under the circumstances. Although subject to certain qualifications, *the rule is that upon the issue of negligence or contributory negligence, evidence of the ordinary practice and the uniform custom, if any, of persons in the performance under similar circumstances of acts like those which are alleged to have been done negligently is generally competent evidence. Evidence of custom is admissible to prove negligence as well as to disprove it.*' (Italics ours.)

The various customs and practices sought to be proved by the Petitioner all concerned the usual and regular method of operating this hump. Petitioner expected it to be operated in accordance with this custom on the night he was injured. He believed he would be given an opportunity to inspect and reject the car before being cut off.

Petitioner had a right to rely upon the observance of the usual custom of operating the hump for as was said in *Kuhn* v. *Stanfield*, 111 F. (2) 469 (CCA 8th, 1940):

"It is true that railroad employees, particularly those working in yards, must as a part of their duty exercise due care for their own safety. But employees are entitled to rely upon rules and *customs* which determine the standards of what they must anticipate." Cases cited.

II.

A perusal discloses that *some evidence* of custom and practice was brought before the jury on re-cross examination of Respondent's witness (R. 264). Petitioner wasn't even allowed to cross-examine on the subject (R. 279).

The error in excluding the admissible evidence tendered in Petitioner's offers of proof on his case in chief was not cured by the admission of *some* of this evidence on re-cross examination of Respondent's witnesses because:

1. All the same evidence *was not later admitted.*

2. Petitioner's excluded evidence pertained to *decisive* facts of negligence and its exclusion is always reversible error *even when later admitted.*

3. That portion of this evidence which was subsequently admitted entered the record *only indirectly thereby carrying no weight.*

4. Petitioner was entitled to present his case in an orderly fashion and from his own rather than Respondent's witnesses.

5. Repeated exclusion by the court (at least twelve times) of Petitioner's evidence so impressed the jury of its immateriality and impropriety that it was given no consideration when finally admitted on re-cross examination of Respondent's witness.

6. The court's instructions to the jury to disregard all excluded evidence, singled out Petitioner's frequently tendered and excluded evidence as entirely unworthy of consideration.

7. The excluded evidence that finally was admitted was not *Petitioner's evidence* in the eyes of the jury as Peti-

tioner had rested his case before this evidence was admitted on his re-cross examination of Respondent's witness.

The error of excluding Petitioner's evidence cannot be considered cured by subsequent admission because *all of the wrongfully withheld evidence* never did reach the jury. Petitioner has listed at least twelve instances in which his evidence was "choked off" by the strenuous objections of defense counsel all of which were sustained by the Judge. *At the very most three of these twelve items were elicited from an adverse witness during the defense.* The evidence was placed into the record and before the jury very indirectly—by re-cross examination of Respondent's conductor (R. 264) as the Court prohibited any of its entrance on cross-examination (R. 279). This was hardly a manner (re-cross) or time of trial (during the defense) that could have any probative effect upon the jury. Yet this evidence was vital to Petitioner's theory of the case.

In the case at bar Petitioner's evidence after being excluded on his case in chief was admitted only piecemeal and incompletely on re-cross examination of Respondent's witness at a time and in an order where it had lost all its force because of repetitiously-sustained objection to such evidence and subsequent instruction by the court that the jury disregard such evidence. The logical conclusion is, as attested by the not-guilty verdict, that the jury gave such evidence no consideration whatever. *The damage to the jury had already been done.*

A. The prejudicial effect of the exclusion because of the vital nature of the excluded evidence.

Excluded evidence on a controlling issue of the case is never cured by subsequent admission. In *Pierce* v. *Farrar, et al.*, 60 Tex. Civ. App. 12, 126 S. W. 932 (1910), a judg-

ment for Respondent was reversed because of wrongful exclusion of Petitioner's evidence, the Court saying on p. 933 of the reporter system:

> "It follows that the trial court erred in excluding the testimony under consideration, and that for such error the judgment must be reversed, and the cause remanded for another trial. The fact that other declarations of the testator Pierce of somewhat similar import were admitted *does not cure the error* and render it improbable that the appellant was not prejudiced thereby. *The testimony was material upon the controlling issue in the case*, and we would not be warranted in saying, in view of the other evidence in the case, that the verdict would have been the same had it been admitted, *and, unless authorized to so say*, it is our duty to reverse and remand the case." (Italics added.)

In *Crossman, et al.* v. *Lurman, et al.*, 33 App. Div. 422, 54 N. Y. S. 72 (1898) the Court observed on page 76:

> "• • • Where the question is one of fact, as is the case here, *and where that question of fact is the serious and only question in the case*, a party should be permitted to give all the testimony that he has upon the litigated question. It *will not do to say that it did no harm* to the defeated party to exclude certain evidence which he offers upon a hotly-litigated question of fact because other testimony was admitted in his behalf upon the same question. He may very well say that, if he had been permitted to give the excluded testimony, the jury would have found with him, and not against him; and for that reason, where the case turns upon a disputed question of fact, and competent evidence bearing upon that question, offered by the defeated party, has been excluded, it is impossible to say that injury was not done to him. For this error this judgment and order must be reversed • • •." (Italics added.)

It is similarly held in *Miles* v. *St. Louis I. M. & S. R. Co.*, 38 Ark. 485, 119 S. W. 837 (1909), at p. 839.

That the error is prejudicial when pertaining to a *vital feature* of the case and where its final admission is in piecemeal and illogical order is further emphasized by the Court in *Goodwin* v. *Barre Sav. Bank & Trust Co.*, 100 Atl. 34 (1917) where on p. 35, the Court said:

> "* * * Nor was the error in its exclusion cured by allowing the defendant to give the evidence in its defense. *One has a right to have the direct and cross-examinations placed in direct contrast before the jury. Stiles* v. *Estabrook, supra; State* v. *Rollenbeck*, 67 Vt. 34, 30 Atl. 696; *People* v. *Becker*, 210 N.Y. 274, 104 N.E. 396. The error was prejudicial, because it related to a vital feature of the defense." (Italics added.)

Illinois holds likewise in *Bibbins* v. *City of Chicago*, 193 Ill. 359, 61 N. E. 1030 (1901) where a verdict in favor of Respondent was reversed and the Court observed:

> "* * * The most seriously contested question of fact was whether the sidewalk was obstructed by dirt and rubbish as alleged. To prove her allegation, the *plaintiff introduced five* witnesses besides herself, and the defendant seven witnesses, but, for some reason wholly unexplained by the court or by counsel in their argument, the court refused to permit one of plaintiff's witnesses, W. W. Cameron, who, as he testified, had passed by or over this sidewalk nearly every day for many months, to testify whether or not there were accumulations of dirt and rubbish on the sidewalk at the place in question at and before the time of the accident, and the court struck out, on motion of appellee, certain answers of this witness which tended to prove the existence of the obstructions complained of. *This was error, and, although the court allowed other witnesses for the plaintiff to testify to the same matter, the error was not cured, as contended by appellee's counsel, because it appears that by this erroneous ruling the plaintiff was deprived of the testimony of a most important witness on a material and contested question of fact in the case.*" (Italics added.)

B. The prejudicial effect of the exclusion because of order of reception of the excluded evidence.

Because the order of presentation is all-important in the probative effect of evidence upon a jury, the courts hold that it is prejudicial error to so restrict admission of evidence that one can present his fact only by cross-examination of his opponents' witnesses. So in the recent case of *Niemann* v. *Garcia*, 144 S. W. (2) 621 (Tex. Civ. App. 1940, the Court said on p. 623:

> "The record is further confused by appellee's statement, presumably from the record, that the witnesses involved actually testified, without objection, to those facts which appellants contend were excluded. Upon examination of the statement of facts, we find that much of the testimony relied upon by appellee as having been adduced without objection, was actually brought out on cross-examination by appellee's attorney. *The rule that the improper exclusion of evidence is harmless when it appears that similar evidence was introduced without objection, does not necessarily apply when that evidence is brought out on cross-examination, as the probative force of testimony is often affected by the manner in which it is elicited.*" (Italics added.)

Bearing in mind that Petitioner's evidence was twelve times rejected, that only after he rested his case was he able to obtain partial admission of this evidence and then only by re-cross examination of Respondent's adverse witnesses and that the Court instructed the jury to disregard such evidence that had been objected to and sustained, we can readily see that this evidence had lost all its probative force.

In *Roswell* v. *Ross, et al.*, 89 Conn. 201, 93 Atl. 236 (1915) at p. 237-8:

> "* * * *The defendants had the right to give their testimony in open court under the guidance of their own counsel, and to have the court observe them as they testified and weigh the testimony as it was given in* * * *" (Italics added.)

In the case at bar Petitioner was entitled to present his case by his own counsel from his own witnesses. That Petitioner's case was fatally prejudiced by the improper order in which his evidence was finally admitted after being condemned twelve times is further attested by the case of *Whitman* v. *McComas,* 11 Idaho 564, 83 Pac. 604 (1903), where the Court said p. 605:

> "* * * After the deed had been rejected by the court in the presence of the jury as incompetent, irrelevant, and immaterial and thus discredited, the introduction of it by the defendant would not cure the error made by the ruling of the court *in the presence of the jury. The respondent had a right to prove his case in an orderly way and not by the grace of respondent's counsel.* That evidence had been condemned by the court, held immaterial, and rejected. Under that state of facts it would not be fair to the appellant to permit counsel for the respondent to say to the jury, 'Although this evidence is incompetent and has been rejected by the court as irrelevant, I will introduce it.' Under those circumstances, the jury would pay no attention to the evidence whatever. Errors of this kind cannot be cured in that way. * * *" (Italics added.)

In excluding Petitioner's evidence so frequently that Petitioner was required to make twelve offers of proof, the Court condemned such evidence so that when finally part of it was admitted it was tainted as immaterial and unworthy of belief and we can readily see why it was entirely rejected by the jury.

Other cases holding that the wrongful exclusion of evidence is not cured upon its subsequent admission are: *Loloff* v. *Sterling,* 31 Colo. 102, 71 Pac. 1113 (1903), at p.

1115; *Tallman* v. *Nelson,* 141 Mo. App. 478; 125 S. W. 1181, (1910) at p. 1184; *Damchuk* v. *Public Service Ry. Co.,* 5 N. J. Misc. R. 136, 136 Atl. 604 (1927) at p. 604; *Nichols Shepard Co.* v. *Horsted, et al.* 33 S. D. 370, 146 N. W. 566 (1914) at p. 567; *St. Louis & S. F. R. Co.* v. *Boyer, et al.,* 44 Tex. Civ. App. 311, 97 S. W. 1070 (1906) at p. 1071; *Engen* v. *Rambler Copper and Platinum Co.,* 20 Wyo. 95, 121 Pac. 867 (1912) at p. 872; *Foster* v. *Sol Greisler and Sons, Inc.,* 150 Pa. Super. 509, 29 Atl. (2) 103 (1942) at p. 107; *Gunn* v. *New York, N. H. & H. R. Co.,* 171 Mass. 417, 50 N. E. 1031, (1889); *Buckeye Cotton Oil Co.* v. *Harris,* 124 Ark. 14, 186 S. W. 292 (1916).

Additional Illinois cases supporting the same view are *Bibbins* v. *City of Chicago,* 193 Ill. 359, 61 N. E. 1030; *Rost* v. *F. H. Noble & Co.,* 316 Ill. 357, 147 N. E. 258 (1925); *Lewis, et al.* v. *Englewood Elevated R. Co.,* 223 Ill. 223, 79 N. E. 44 (1906); and *Chicago Union Traction Co.* v. *Miller,* 212 Ill. 49, 72 N. E. 25 (1904).

C. The prejudicial effect of the exclusion because of the Court's repetitious exclusion of Petitioner's evidence.

In the case at bar Petitioner's evidence was so repeatedly refused admission that he was required to make twelve offers of proof. When Petitioner's evidence finally was partially admitted on re-cross examination of Respondent's witness, it had lost all its probative force. It was not Petitioner's evidence any longer as it was elicited during re-cross examination of Respondent's witnesses. In a similar instance the Court observed in *Greenlee* v. *Mosnat,* 126 Iowa 330, 101 N. W. 1122 (1905) at p. 1123:

> "• • • It follows as a necessary consequence that the exclusion of the defendant's evidence in support of this claim was prejudicial error. Counsel for appellee seek to avoid this result by suggesting that, notwithstanding the ruling complained of, the defendant did in

fact state what he claimed to be the fact in respect to this service. But this is hardly correct. It is true that defendant did speak of certain services performed by him in relation to a claim against another insurance company, but the matter came into the record in an indirect manner, and did not serve to neutralize the effect of the rulings complained of. *The exclusion of the testimony was so often and so emphatically repeated that the jury must have been thoroughly impressed with the thought that the testimony was immaterial, and not entitled to any weight in the defendant's favor.* The ruling sustaining the plaintiff's objection was never withdrawn or modified and we cannot assume that the error was cured because *a part of the excluded testimony* indirectly found its way into the record (Italics added.)

"As there have been two verdicts in the case, we regret the necessity of remanding it for another trial, but the error referred to seems to be manifest, and its prejudicial character cannot be doubted * * *."

In the case at bar, the Petitioner was so fatally prejudiced by the repeatedly-sustained objections of defense counsel that the error of excluding this evidence was never cured by its partial admission on re-cross examination of one of the opposing witnesses.

D. The prejudicial effect of the exclusion because of the Court's instruction to the jury.

Finally, his evidence, when ultimately partly admitted after repeated objections by counsel and exclusion by the Court, was again branded as immaterial by the Court's instruction to the jury to disregard all excluded evidence (Abst. 237).

In *Moss* v. *Wells,* Mo. 249 S. W. 411 (1923) as in the case at bar there was a verdict for the Respondent and the Petitioner appealed on the ground that his evidence had been improperly excluded. The Respondent contended the error was cured because the evidence was subsequently

admitted. There as here an instruction was given to the jury that it was to disregard all testimony objected to and to which the Court had sustained the objection. In holding the error prejudicial and in reversing the case for a new trial the Court said on p. 412:

> "* * * But it is said that plaintiff's son testified, without objection, to the same facts relative to the failure of the conductor to heed plaintiff's call to stop at Twentieth and Nineteenth Streets, as did plaintiff, and that cured the error, if any, in striking out plaintiff's testimony to the same facts. This is untenable for several reasons: First, because the plaintiff was entitled to have more than one witness testify to the same facts favorable to her case when controverted. Second, the striking out of plaintiff's testimony by the Court, because it was immaterial, may have caused the jury to believe her son's testimony to the same facts was also immaterial, *especially as the Court gave an instruction telling the jury not to consider any testimony stricken out by the Court.*
>
> "We rule this point against the respondent.
>
> "It is also said that the error, if any, was cured because after her testimony regarding her ringing of the bell to stop at Twentieth and Nineteenth Streets had been stricken out, she again testified to the same thing, and thereupon plaintiff's counsel himself, said for her to 'leave that out; that has been ruled out.' We think it was the duty of plaintiff's counsel to respect the ruling of the Court and not permit his witness to evade it, as he did do. *Especially was the error not cured by this subsequent testimony because the Court subsequently instructed the jury not to consider testimony that had been stricken out* * * *" (Italics added.)

Petitioner's tendered evidence was vital to his theory of his case and he was entitled to have it admitted *in proper order* and under circumstances of judicial sanction. The repeated exclusion of his evidence of itself was prejudicial error as the judicial disapproval was magnified with each exclusion. Its *partial admission* in an indirect manner on

re-cross examination of Respondent's witnesses could not cure the error and the Court's instruction to the jury absolutely condemned it. Under such circumstances there can be no doubt that the Petitioner was fatally prejudiced.

III.

The Trial Court erred in refusing to give Petitioner's instruction on the law governing his theory of the case.

Because of the erroneous rulings of the Court, the Petitioner was left with but a fraction of his case to be considered by the jury. The Petitioner tendered the following instruction (R. 307) which the Court erroneously refused to give to the jury:

> "If you believe from a preponderance or greater weight of the evidence that the box car in question was at the time in question covered with snow and ice and that defendant knew, or in the exercise of ordinary care should have known that the snow and ice, if any, was there and knew or should have known, that its presence rendered it dangerous for a man to go upon and ride said car; and if you further find from a preponderance of the evidence that plaintiff went upon the box car in question in the course of his employment at the order and direction of defendant's conductor and that said conductor had authority to give such order and direction, if any; and if you further find and believe from the preponderance of the evidence that the accident and injury to the plaintiff was the direct and proximate result, in whole or in part, of obeying the conductor's order, if any, then you should consider this together with all of the facts and circumstances proved by a preponderance of the evidence in arriving at your verdict."

No other instruction was asked and none was given covering this theory of Petitioner. This was a proper enunciation of the law and it was prejudicial error to refuse it.

It is negligence to order an employee into a known unsafe place to work regardless whether such dangerous place is caused by actual negligence of the Respondent or by climatic conditions.

One of Petitioner's allegations (R. 69) stated that Respondent negligently directed and ordered Petitioner to ride said car, when it knew or in the exercise of ordinary care should have known, that it was covered with snow and ice and that the presence of said snow and ice coupled with the absence of a brake platform from which to operate said car increased the hazard and danger to the Petitioner in operating said car.

The instruction tendered was a correct proposition of law and Petitioner was entitled to have the jury instructed on his theory of the case. Refusal by the Court to give an instruction on one's theory was held in *Chicago Union Traction Co.* v. *Browdy,* 206 Ill. 615, 623, to be reversible error.

It was the conductor's job to see that the cars were safe to ride (R. 79), and he could from his vantage point in the tower over the tops of car (R. 79) see the top of this car. There were lights shining onto the top of the cars right at the conductor's tower (R. 80). In addition the cars were inspected before they come into the yard. It was no defense, therefore, that the car was made unsafe because of climatic conditions. If the conductor saw or should have seen the icy condition of the top of Petitioner's car and nevertheless ordered Petitioner to ride it the Respondent is chargeable with conductor's negligence.

In *Halloran* v. *Chicago and North Western Ry. Co.,* 327 Ill. App. 217, 63 N. E. (2) 670 (First District, 1945, published in abstract only) the Petitioner was injured in complying with an order of his conductor to board a moving train. The evidence showed that the grab irons of the cars

were covered with ice and one of the averments of negligence was that "Defendant's conductor negligently gave a peremptory order to board the train although the grab irons and stirrups he was required to use were coated with ice and the cars were moving at high speed."

The Illinois Appellate Court therein stated:

> "The jury had the right to take into consideration the fact that the hand hold was covered with ice in determining whether defendant's conduct, viewed as a whole, was negligent. The jury was required to consider this fact along with the other attending circumstances in determining *whether the order given to plaintiff to board the car was negligent.*"

Chicago R. I. & P. Ry. Co. v. *Cline,* 14 P. (2) 495—Colo. (1932) is a case almost identical with the one at bar except that there the Plaintiff was ordered to dismount a moving car at an icy location. This was a case under the Federal Employers' Liability Act. Plaintiff and his foreman were patrolling the track on a gasoline track car. The car was going about ten to twelve miles per hour and as the car started upgrade the snow on the rails caused the wheels to spin and slip so that the car lost traction. The foreman ordered Plaintiff to jump off the car and to get gravel to put under the wheel. Plaintiff jumped pursuant to his orders and slipped and injured himself on an icy bank of a drainage ditch covered with a thin film of snow. Plaintiff did not know of the ice though the foreman was familiar with the condition of the track and the drainage ditch.

In holding the Defendant railroad liable for ordering plaintiff into an unsafe place, even though the unsafe condition was an act of God, the Court held:

> "The alleged negligence of the company consisted, not in the company's failing to remove the snow and ice, but in the foreman's ordering Cline to jump from

the car, considering the rate of speed at which it was going, the slope of the bank, and the presence of ice and snow. We cannot say that, as a matter of law, the company was not chargeable with negligence. In the circumstances, the question of negligence was for the jury to determine."

Another railroad case parallel with the one at bar is *Texas & P. Ry. Co.* v. *Presley,* 152 S. W. (2) 1105 (Tex. 1941). In that case Plaintiff, while employed as a section hand for the Defendant railroad, fell from a house he was repairing for the Defendant and was injured. The Court states the following facts and law:

"The night before plaintiff was injured there was a heavy rain in the vicinity of the section house which was being repaired. Water was standing around the house and the ground in that vicinity was muddy. The roof of the house was covered with metal shingles and the roof was steep. The roof was wet from the rain that had fallen the night before. On the morning after the rain, and under the conditions mentioned, he was ordered by his section foreman to get a ladder and go up on the roof and repair a brick flue located at the top of the roof. Plaintiff climbed the ladder and attempted to scale the metal roof. When he was about half way up thereof his feet slipped from under him, he slid off the roof and onto the ground and sustained the injury complained of. Plaintiff contended and there was evidence to that effect and the jury found, in substance, that defendant was guilty of negligence because (1) the defendant's foreman ordered plaintiff to go upon the roof and repair the flue when the conditions and circumstances were such that it was extremely dangerous and hazardous to attempt to climb the roof or repair the flue; (a) that defendant was negligent in not furnishing plaintiff with a reasonably safe place for him to perform the labor required of him; * * * (4) We think the evidence is sufficient to sustain plaintiff's contentions and the findings of the jury with reference thereto. We think plaintiff correct in his contention that the injury did not result from *climatic conditions alone;* that they resulted from

an improper command at an improper time for plaintiff to go up on the roof when it was dangerous and hazardous to do so and defendant's failure to provide plaintiff or to use reasonable diligence to provide him, with a safe place and proper and suitable tools and facilities with which to do the work, under the circumstances. The command to go up on the roof and make the repairs under the circumstances was given at an inopportune time. (But the time alone was not the cause of the injury.) The evidence shows there was no emergency. There was no situation which made it either imperative or important that the work plaintiff was commanded to then do was necessary at that time. Whether or not the matters mentioned constituted negligence, under the circumstances, was a question of fact for the jury. The court, therefore, did not err in overruling defendant's motion for an instructed verdict. Cases cited."

The negligence exists not in the condition but in ordering the Petitioner into the place where the condition may injure him.

Illinois is in accord with this principle of law. In *Grannon* v. *Donk Bros. Coal and Coke Company,* 259 Ill. 350, 102 N. E. 769 (1913), Plaintiff miner was injured when ordered by his foreman to work in a portion of the mine where a fall had occurred. After making an investigation, the foreman ordered the Plaintiff to clean up the debris. In affirming a judgment for the Plaintiff, the Supreme Court of Illinois said:

"Where the master directs the servant to work in a place of known danger and the servant while obeying such order is injured he may recover for such injury if he is himself in the exercise of due care and the danger is not so apparent that no reasonable man would undertake to obey the order given. This rule was applied in *Consolidated Coal Co.* v. *Wombacher,* 134 Ill. 57, 24 N. E. 627, under a state of facts very similar to that presented by the evidence in this case."

Other cases holding the employer liable for ordering an employee into a known dangerous situation are: *William* v. *Terminal R. Assn.*, 20 S. W. (2) 584 (Mo. 1929), where Plaintiff employee was allowed to recover from the railroad for negligently ordering him through its foreman to board a moving train at a point where he could be and was brushed off by an express truck standing in dangerous proximity to the track; *Clark* v. *Union Iron and Foundry Co.*, 234 Mo. 436, 137 S. W. 577 (1911), where Plaintiff employee sued the Defendant employer for injury sustained when he climbed a pole to raise a guy rope on order of his foreman and was electrocuted when the guy rope block came in contact with a charged wire, it being held that Plaintiff was not bound to search for danger but had a right to rely upon the judgment and discretion of his foreman; and in *Vandalia R. Co.* v. *Kendall*, 68 Ind. App. 1, 119 N. E. 817 (1918), in which Plaintiff employee recovered damages from Defendant railroad for injury sustained in attempting to board a moving train at the order of his superior.

In this latter case, the train was moving fast and Plaintiff had to board it from an insecure position. In holding that it was a jury question whether or not the order was negligently given under the circumstances the Court said:

> "The rule adopted in this state seems to be that if a servant is injured while obeying a direct command of the master he will not be held to have assumed the risk unless the danger is so great and imminent that a reasonably prduent person would not have assumed it. *Mellette* v. *Indianapolis, etc. Trac. Co.*, 45 Ind. App. 88, 86 N. E. 432; *Brazil Block Coal Co.* v. *Hoodlet*, 129 Ind. 327, 336, 27 N. E. & 41. The reasoning for this view is that by giving the direct command to perform the work the master takes upon himself the risks which otherwise would be assumed by the servant. The

servant does not stand on the same footing with the master. His primary duty is obedience; and, if of the master, it is proper that he should be recompensed. It is upon this inequality of positions that it is held that a prudent man has a right, within reasonable limits, to rely upon the ability and skill of the agent in whose charge the common master has placed him, and is not bound at his peril to set his own judgment above that of his superior."

As Petitioner's conductor was in a superior position from his location in the tower to see and appreciate the hazard of the snow and ice on the brake platformless box car, he ordered the Petitioner to ride, the Petitioner had a right to direct these facts to the attention of the jury so that they could determine whether the conductor was negligent in giving his order.

The instruction that the Petitioner presented to the Court paraphrased one approved in a similar case by the Supreme Court of Missouri. The instruction was quoted in *Berry* v. *Baltimore and Ohio Railroad Company,* 43 S. W. (2) 782 (Mo. 1931) and though not given in that case was held to be a correct proposition of the law.

This was a case under the Federal Employers' Liability Act in which Plaintiff brakeman was injured when ordered by his conductor to disembark from the caboose as the train, unknown to both Plaintiff and his conductor, stopped so that the caboose was standing on an unguarded trestle from which Plaintiff fell. The Supreme Court of Missouri held that Defendant railroad was negligent in ordering Plaintiff to get off at a dangerous place.

In *State, ex rel.* v. *Ellison,* 283 Mo. 532, 223 S. W. 651, this Court had under review an opinion of the Kansas City Court of Appeals. The negligence claimed in that case was that Plaintiff's foreman ordered him to climb a defective telegraph pole when he (the foreman) knew, or should have

known, it was weak and defective. The Court of Appeals had said: "Under the foregoing circumstances, if the foreman failed to exercise ordinary care in ascertaining whether the pole was or was not reasonably safe to be climbed, and ordered plaintiff to go up the pole and remove the wires, then there can be no doubt of defendant's liability." The Court of Appeals had approved an instruction which told the Jury:

> "If you further believe and find from the evidence that plaintiff went upon such pole in the course of his employment, pursuant to an order or direction of a foreman of the defendant, and that such foreman, in giving plaintiff such order or direction, had authority from defendent to direct and order the plaintiff to go up on said pole as a part of his duties as such employee, and if you further believe and find from the evidence that at the time of such order or direction, if any, the condition of such pole was known, or by the exercise of ordinary care could have known, to the defendant or its foreman, then your verdict must be for the plaintiff."

Petitioner's counsel in preparing his instructions to tender to the Court in the instant case copied the instruction approved by the Missouri Supreme Court changing and paraphrasing it to fit the case at bar. The peremptory ending was, however, changed to embody the ruling of our Appellate Court in *Halloran* v. *Chicago and North Western Ry. Co.*, 327 Ill. App. 217, 63 N. E. 670 (First District, Third Division, 1945) where the Court said:

> "The jury had the right to take into consideration the fact that the hand hold was covered with ice in determining whether defendant's conduct, viewed as a whole, was negligent. The jury was required to consider this fact along with the other attending circumstances in determining whether the order given to plaintiff to board the cars was negligent."

The Court will readily see that Petitioner's tendered instruction is a correct enunciation of the law, is complete in its application to the evidence introduced, and has judicial precedent and approval even in a peremptory form which for safety's sake Petitioner changed so that it could not be considered objectionable.

Unless the jury was instructed that in determining whether the Respondent was negligent they had a right to consider whether the snow and ice on the roof of the box car made the car hazardous for Petitioner to ride and that this was known by the conductor when he ordered Petitioner thereon, the jury would not know that the Respondent could be liable for ordering an employee into a place made unsafe by climatic conditions. When a fortuitous snow storm on the day preceding the final argument to the jury gave Respondent's counsel a weighty argument which he used to great advantage, the jury, without the benefit of an instruction from the judge could and was easily led to believe that conditions of snow and ice were acts of God for which a railroad could not be liable irrespective of the circumstances.

Here we have a dangerous condition known to the Respondent through its conductor and other employees whose duty it was to know, and who were in a position to know and did know the dangerous situation. We have the Petitioner on the ground where he could not, and did not know the danger into which he was ordered by his conductor who knew all the facts.

A late case is *Skidmore* v. *Baltimore & O. R. Co.*, 167 F. (2) 54 (C. C. A. 2nd, March 15, 1948). That was a case under the Federal Employers' Liability Act. The Petitioner was a car repairman who was ordered by his superior to repair a car at a place in the railroad's yard that was completely covered with ice and snow. Petitioner was in-

jured when he slipped on the ice in performing the work there pursuant to the superior's order, and the Court in sustaining a verdict for the Petitioner found that the evidence was sufficient to justify the jury in concluding that the Respondent was negligent *in ordering the Petitioner to work in a place made unsafe by reason of the ice and snow,* even though this was a climatic condition.

In view of these, the Court was wrong and the instruction should have been given. It was the only one asked on this theory of Petitioner's case.

Petitioner contends it was reversible error for the court not to give his tendered instruction.

Conclusion.

Because of the erroneous and prejudicial exclusion of his evidence by the Trial Court, the Petitioner was unable to properly present evidence before the jury establishing the allegations of his complaint. This error, together with the Court's refusal to instruct the jury on that portion of Petitioner's case which he was able to present deprived the Petitioner of his right to a fair trial before a jury.

For the foregoing reasons, the Petitioner requests that the writ prayed for in the petition be granted; and that the judgment of the Trial Court and the Appellate Court be reversed and the cause remanded for a new trial.

Respectfully submitted,

FRANCIS H. MONEK,
Attorney for Petitioner.

EDWARD B. HENSLEE,
WALTER N. MURRAY,
MELVIN L. GRIFFITH,
Of Counsel.

INDEX.

PAGE

Argument:

1. Summary Statement of Issues 9
2. The Appellate Court correctly held there was no prejudicial error in the admission or rejection of the evidence 10
3. There was no error in the admission of the undisputed evidence relating to respondent's habit and custom in handling its cars in the Altoona Classification Yard 14
   (a) The petitioner's tendered evidence was incompetent to prove habit and custom..... 16
4. The court did not commit error in refusing to give petitioner's tendered instruction 26
5. The instruction was erroneous as a matter of law 32
   (i) The instruction was unintelligible 32
   (ii) The use of the word "dangerous" in the instruction was error 33
   (iii) The Appellate Court correctly held there was no error in refusing the instruction... 34
6. It was a question of fact for the jury to determine whether the respondent was negligent in failing to furnish the petitioner with a safe place to work. The Illinois courts correctly refused to set aside the verdict of the jury finding the respondent not guilty 35

Conclusion 36

Jurisdiction 2

Opinion of the Court Below 1

Questions Presented 3

Statement of Facts (additional) 4

Summary of Argument 3

Summary Statement of the Issues 9

CITATIONS.

Cases:

Advance v. Thompson, 320 Ill. App. 406, 418, rev. on other grounds, 387 Ill. 77 11
American Ins. Co. v. France, 111 Ill. App. 310..... 18
Andrews v. City of White Hall, 184 Ill. App. 298, 302 16
William C. Barry, Inc. v. Baker, 82 F. (2d) 79..... 16
Berry v. Baltimore & O. R. R. Co. (Mo.), 43 S. W. (2d) 782 27
Bourland v. Louisville & N. R. Co., 199 Ill. App. 126 33
Brotherhood of Loc. Firemen and Enginemen v. Raney (Tex.), 101 S. W. (2d) 863..... 16
Busick v. Ill. Central R. Co., 201 Ill. App. 63..... 33
C. C. C. & St. L. Ry. Co. v. Jenkins, 174 Ill. 398, p. 407 20
Central Vermont Ry. v. White, 238 U. S. 507, 515... 11
Chicago City Railway Co. v. Carroll, 206 Ill. 318...23, 24
Conklin Const. Co. v. Walsh, 131 Ill. App. 609..... 33
Cook County v. Calumet & C. Canal & Dock Co., 138 U. S. 635 11
Duncan v. Kammeier, 206 Ill. App. 207..... 33
Eaton v. Thieme, 15 Cal. App. (2d) 458, 59 P. (2d) 638 16
Ellis v. Union Pac. R. Co., 329 U. S. 649..... 36
Funderbunk v. Sovereign Camp W. O. W., 179 S. C. 80, 183 S. 462 16
Grant v. Matson, 68 S. D. 402, 3 N. W. (2d) 118.... 16
Harden v. Kifer, 188 Okla. 53, 111 P. (2d) 490..... 16
Herb v. Pitcairn, 324 U. S. 117, 120.....11, 25
Iterman v. Baker, 214 Ind. 308, 15 N. E. (2d) 365.. 16
Jansen v. Aholt (Mo. App.), 189 S. W. (2d) 121.... 16
Joice v. Missouri-Kansas-Texas R. Co., 354 Mo. 439, 189 S. W. (2d) 568 11
Kamienski v. Bluebird Air Service, 389 Ill. 462, 464 17

Keiger v. City of Faribault, 220 Minn. 89, 18 N. W. (2d) 777 16
Klusemeier v. East St. Louis Bridge Co., 210 Ill. App. 537 33
Kneip v. Schroeder, 166 Ill. App. 215..... 18
Lavender v. Kurn, 327 U. S. 645, 652..... 36
Los Angeles Milling Co. v. Los Angeles, 217 U. S. 217, 226 11
Miller Agency, Inc. v. Home Ins. Co., 276 Ill. App. 418 .....18, 19
Mobile Fruit Trading Co. v. J. H. Judy & Son, 91 Ill. App. 87 18
Myers v. Reading Co., 331 U. S. 477, 485..... 36
Neice v. Chicago & Alton R. R. Co., 254 Ill. 595, 605 16
Papin v. Goodrich, 103 Ill. 86..... 19
People v. National Box Co., 248 Ill. 141..... 33
Puget Sound Nav. Co. v. Lavender, 160 F. 851..... 16
Quin v. Heihold, 100 Ill. App. 320..... 18
Ritholtz v. Andert, 306 Ill. App. 61..... 24
Schillo v. City of Chicago, 326 Ill. App. 423 (Abs.) 16
Senquist v. Hardward Mutual Fire Ins. Co., 296 Ill. App. 510, 523, aff'd 371 Ill. 360..... 16
Shortway Lines v. Sutton's Admr, 219 Ky. 541, 164 S. W. (2d) 809 16
Showalter v. Western Pac. R. R. Co. (Cal.), 96 P. (2d) 964, sub. op. 16 Cal. (2d) 460, 96 P. (2d) 895 11
Soibel v. Oconto Co., 299 Ill. App. 518, 523..... 16
Standard Oil v. Neville, 48 F. (2d) 580..... 16
Suchomel v. Maxwell, 240 Ill. 231, 235..... 16
Swartout v. McDonald Mortgage & Realty Co., 102 Ind. App. 298, 199 N. E. 467..... 16
Tennant v. Peoria & P. U. Ry. Co., 321 U. S. 29..... 36
Thomas v. Metropolitan Life Ins. Co., 131 Pa. Super 588, 200 A. 210..... 16
Turner v. Donovan, 50 Ill. 85..... 19
U. S. v. Cole, 45 F. (2d) 339..... 16

Van Ameringen v. Cohen, 254 Ill. App. 576, cert. den. 254 Ill. App. XIX..... 16
Whyte v. Rogers, 303 Ill. App. 115..... 24
Wilkerson v. McCarthy, 336 U. S. 53, 62..... 36
Wilson v. Bauman, 80 Ill. 493.....18, 19

Statutes:

45 U. S. C. A. 51-60.....9, 11
Ill. Rev. Stats. 1947, Chap. 110, Par. 199..... 9

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1949.

No. 234

GRANT J. COWHER,

Petitioner,

vs.

THE PENNSYLVANIA RAILROAD COMPANY,
a Corporation,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

I.

OPINION OF COURT BELOW.

The opinion of the Appellate Court is published in abstract form only, in the official reports, *Cowher* v. *Pennsylvania Railroad Company*, 336 Ill. App. 308, 83 N. E. (2d) 359. The petition of the petitioner for leave to appeal to the Illinois Supreme Court was denied without opinion.[1]

[1] The full text of the opinion of the Appellate Court is found in the record. (R. 1-19.)

II.

JURISDICTION.

The respondent suggests that the court should deny certiorari for the reason that the trial in the state court resulting in a verdict of the jury finding the respondent not guilty, was in conformity with Federal statutory requirements, as construed by this court.

III.

QUESTIONS PRESENTED.

The ultimate issues presented by the record, are:

(a) Did the Illinois courts err in refusing to set aside the verdict of the jury finding the respondent not guilty, because of alleged errors in the admission or rejection of evidence of habit and custom tendered by petitioner; and incidentally, was the question of the admissibility of evidence a Federal or a State procedural question.

(b) Did the Illinois courts err in refusing to hold that there was prejudicial error in the refusal of the trial court to give an instruction tendered by the petitioner.

IV.

SUMMARY OF ARGUMENT.

(1.)

Summary Statement of the Issues.

(2.)

The Appellate Court correctly held that there was no prejudicial error in the admission of the undisputed evidence relating to the method of handling cars by the respondent in the classification yard from the hump to their destination on the various tracks.

(a) The petitioner is in no position to complain regarding the rejected evidence offered pertaining to habit and custom for the reason that the offered evidence was in fact incompetent in the form tendered, to prove such facts.

(3.)

The Illinois courts did not err in holding that the trial court correctly refused to give petitioner's tendered instruction.

(4.)

It was a question of fact whether the respondent was negligent in failing to furnish the petitioner a safe place in which to perform his work. The evidence on every material issue of this question preponderated heavily in favor of respondent. The Illinois courts did not err in refusing to set aside the verdict of the jury finding the respondent not guilty.

V.

RESPONDENT'S ADDITIONAL STATEMENT OF FACTS.

The petitioner, a brakeman, in the employ of the respondent was injured in its Altoona, Pennsylvania, Yards on February 1, 1945 at 11:55 P. M. (R. 76, 77), when he fell while alighting from a standing box car, after it had reached its destination and coupled onto a standing car. (R. 124, 125.)

The petitioner in his complaint charged that the respondent was negligent in failing to furnish him with a reasonably safe place to work. (R. 69.) The allegations of his complaint (R. 68, 69) and the evidence adduced at the trial show that petitioner based his case upon the alleged presence of ice and snow on the top of the box car in question; that the presence of such ice and snow, therefore made it an unsafe place for the petitioner to perform his work.

The petitioner also testified that the place where he stopped the car "was very dark. I could not see as the floodlights had been shut off." (R. 91.) All of the petitioner's co-employees appeared as witnesses for the respondent and disputed petitioner's testimony in this respect: (a) John W. Chatham, a conductor in charge of the classification yard at Altoona, (R. 257) and who was on duty at the hump (R. 262) that night from 11:00 P. M. to 7:00 A. M. (R. 262) said, (R. 260, 261) "As far as I could see the yard was illuminated by floodlights on the night of February 1, 1945"; (b) J. E. Makin, yardmaster, testified as to the location and power of the floodlights at the yard. (R. 265.) He said, (R. 266) "The lighting conditions in the Yard on the night of February 1, 1945

were that it was very light. All the lights were illuminated." He further testified that "The part of the Yard immediately west of the bridge (location of car in question) is illuminated. It was illuminated that night." (R. 266); (c) T. S. Norris, gang foreman in respondent's car inspection department, (R. 285) who inspected the top of the car immediately after the accident (R. 289), said, "The top of the car was well lighted on account of the floodlights above us, * * * The top of the house car was well lighted up—this particular car."; (d) J. E. Denning, a car inspector of this respondent, (R. 294) who made the inspection of the car in question with Mr. Norris, testified (R. 295), "I did see there was sufficient light there to note any difficulties on the car without use of the handlight."; (e) F. M. Mikusinski, an employee of the respondent whose duty it was to inspect and maintain the floodlights, at the Altoona Yard (R. 298, 299) testified concerning the location of the floodlights; that he was on duty until 9:00 or 10:00 o'clock on the night of February 1, and that none of the lights was out during the time he was there.

The petitioner testified that there was three inches of hard snow on top of the car; that there was a crust on it and that there were foot marks in that snow. (R. 90.) The petitioner also testified that one of the reasons why he slipped was because there was ice and snow around the grab iron on top of the car. (R. 92.)

The petitioner freely admitted that when he climbed on the car at the hump that he used the grab iron on the top of the car to reach the top of the car. In this respect he said (R. 124):

> "When I got on the top I got hold of the grab iron on the roof. I don't remember with which hand I grabbed it. I pulled myself up by means of the grab

iron. This grab iron is about 20 or 22 inches long and is made out of metal, about 5/8 inch metal. It stands about three inches above the car."

The petitioner further testified that after he reached the top of the car, "I stood on top of the car as it traveled for about ten car lengths, after I got off the ladder. Then I traveled about 25 car lengths while seated." (R. 124.)[1]

The petitioner was the only person who testified as to the presence of ice and snow on the top of the box car in question.

In his statement to the respondent, immediately following the accident, (Defendant's Exhibit 5, R. 268) he said:

> "Car stopped and in getting off car lost my hold, fell to six feet injuring left wrist."

No mention was made by the petitioner of the ice and snow on the top of the car in this report.

In his signed statement on February 13, 1945 (the accident happened on February 1, 1945) he said (Defendant's Exhibit 1, R. 283):

> "I went over the side ladder of the car and after descending down the ladder about two treads, my feet slipped off of the ladder and broke my hold on the car and I went down to the six foot."

The Appellate Court in this respect in its opinion said (R. 7, 8):

> "When plaintiff gave his statement immediately following the occurrence he said nothing about snow or ice being on top of the car or on the rungs of the ladder. About 12 days after the occurrence he signed another statement in which he attributed his mishap to the snow and ice on the car. The car upon which plaintiff rode and from which he fell had been picked up at Vandergrift at 1:25 A. M. and arrived at Al-

[1] On direct examination he testified that when he reached the top of the car he did not have any place to stand so he sat down. (R. 89.)

toona at 9:20 P. M. Vandergrift is situated about 250 miles east of Pittsburgh. There was no evidence to indicate that snow had fallen on the train as it proceeded westward to Altoona. Immediately following the occurrence an inspection of the car was made by defendant's car inspectors, T. S. Norris and P. E. Denning. The Witness Norris testified that a complete inspection of the car was made. *His report showed that there was no snow or ice on the roof.* Mr. Denning, who accompanied Norris, did not climb to the top of the car *but did examine the ladders on the sides of the car. He stated that there was no snow on them.* The car which plaintiff rode down the hump just before getting on the box car was free of snow and ice." (Emphasis supplied.)

The car on which petitioner claimed to have sustained his injury was Great Northern Box Car 33415. (R. 253.) This car was picked up at Vandergrift about 250 miles to the east of Pittsburgh. (R. 254.) The train left Vandergrift at 1:25 A. M. on February 1, 1945. Respondent's freight conductor Smith, said that he stayed with this train until he delivered the train and the car in question to respondent's Altoona Yard at 9:20 P. M. on February 1, 1945. (R. 254.) The conductor's report (Respondent's Exhibit 3) shows these facts. (R. 255, 256.) Smith further testified that he did not know the weather conditions that prevailed from the time he left Pittsburgh until the time "we delivered the train in the Altoona Yard." (R. 257.)

Respondent's conductor Chatham (R. 257) who was on duty at the Altoona Classification Yard at the hump in question, testified that he did not know when the petitioner boarded the car that night; that he did not see him get on the car; that he saw him on the car "when he came up past me." He further testified that he could not recall whether there was any snow on the roof of the car.

(R. 260.) He also testified that he did not recall the weather conditions that prevailed that night in the Altoona Yard. However, respondent's gang foreman Norris (R. 285) who inspected the car in question immediately after the occurrence testified (R. 286) that he found "nothing wrong with the car whatsoever"; that he made an inspection "all over the car, top and bottom, underneath and everything." He further said that, "I found the roof of the car free from anything and all the safety appliances were in first-class condition, the handhold, running board, etc. There was no ice and snow accumulated on the roof of the car." (See also, R. 291.)

Respondent's car inspector, Denning, (R. 294) who inspected this car with Norris, but did not go on the roof of the car, testified (R. 296) that he did not know what the roof of the car was like, but that there was no snow on the other parts of the car.

The petitioner testified that there was about six inches of snow on the ground; that it had a hard crust on it; that the snow had melted a few days before and had frozen again. He further testified that it had not been snowing "that day (referring to date of the accident) nor had it been snowing in Altoona for a couple of days previous to this time." (R. 88.)

Respondent's conductor in charge in the tower said that when the car came past him that the petitioner was on the car (R. 260); that he did not order the petitioner to get on the car (R. 260) as testified to by petitioner. (R. 88.) This conductor also testified that in handling cars over the hump it was the brakeman's duty to test the car to see if it was safe to ride before it was cut off; that before the car is cut off the brakeman tests the car to see if it is all right and until this is done, the car is not cutoff. (R. 263, 265.)

It is obvious that the controversial issue in this case was the question as to whether or not there was ice and snow on the car in question. It is further apparent that if the jury believed that there was no snow and ice on the car in question, that the petitioner had no cause of action. It is also apparent from the transcript of record that the jury accepted the version of the occurrence as testified to by respondent's witnesses, after hearing the evidence on the disputed questions of fact, (a) whether there was ice or snow on the top of the box car in question, and (b) whether the place where the petitioner alighted from the car in question was dark or well illuminated.

We will demonstrate in the argument to follow that all of the facts on this question were fairly and impartially submitted to the jury under proper instructions by the court.

VI.

ARGUMENT.

1.

Summary Statement of the Issues before the Illinois Courts.

In the present action the petitioner sought to recover damages for injuries alleged to have been sustained under the provisions of the Federal Employer's Liability Act.[1]

Trial was had under the Illinois procedure before a jury, which returned a verdict finding the respondent not guilty. (R. 71.)

The Illinois Appellate Court affirmed the judgment of the trial court entered on the verdict of the jury. Subsequently under Illinois procedure,[2] the petitioner filed

[1] 45 U. S. C. A. 51-60.
[2] Ill. Rev. Stats. 1947, Chap. 110, Par. 199.

his petition for leave to appeal to the Illinois Supreme Court. That court, after considering the petition filed by the petitioner, and the answer filed thereto by this respondent[3] denied the petition, making the judgment of the Appellate Court final.

The petitioner in his petition for writ of certiorari to this court reasserts in substance the grounds upon which he sought a review of the judgment of the Appellate Court in the Illinois Supreme Court, which were as follows (R. 20, 23):

> (a) That the Appellate Court misunderstood the issues in that the trial court improperly excluded evidence of habit and custom under which cars were handled at respondent's Altoona Classification Yard; that the court sustained objections to his attempts to prove these matters in the presence of the jury to the prejudice of the petitioner.
>
> (b) That the petitioner was prejudiced by the manner of the admission of certain evidence pertaining to respondent's habit and custom in the manner of handling its cars at its Altoona Classification Yard.
>
> (c) That the trial court erred in refusing to give a certain instruction tendered by the petitioner.

2.

The Appellate Court correctly held that there was no prejudicial error in the admission or rejection of the evidence.

The petitioner contends that the trial court erred in refusing to admit certain evidence offered by him to prove certain habits and customs of the respondent in the manner of handling of its cars at the Altoona Classification Yard.

The respondent submits that there is grave doubt whether rejection of the evidence in question raises a

[3] Not included in transcript of record.

Federal question under the Federal Employer's Liability Act,[1] but was merely a question of state procedure.[2]

If it be assumed that the question of the admissibility of the evidence of habit and custom raised a federal question, we shall demonstrate that there was no prejudicial error in this respect which entitled the petitioner to a reversal of the judgment entered on a verdict of the jury finding this respondent not guilty.

The petitioner particularly objects to the statement of the Appellate Court wherein that court in its opinion said (p. 23 of Pet.):

> "Nothing occurred *in the presence of the jury* that would suggest to the jury that the court considered proof of the custom not to be proper." (Emphasis in statement of petitioner.)

The petitioner points out several instances wherein certain offered evidence was rejected. In many instances the petitioner's attorney, himself, said *in the presence of the jury* that he would make an offer of proof of the rejected evidence (R. 81; R. 87; R. 97; R. 106; R. 109). The court did not comment or state at any time, in the presence of the jury, that proof of the custom sought to be established was inadmissible. It will be noted that the petitioner in each of the cited instances told the court *in the presence of the jury* that he would *make an offer of proof*. If any error occurred in the trial, in the respect mentioned, it was induced by counsel for petitioner repeatedly stating *in the*

---

[1] 45 U. S. C. A. 51, 60.

[2] *Herb* v. *Pitcairn*, 324 U. S. 117, 120; cf. *Central Vermont Ry.* v. *White*, 238 U. S. 507, 515; *Los Angeles Milling Co.* v. *Los Angeles*, 217 U. S. 217 226; *Cook County* v. *Calumet & C. Canal & Dock Co.*, 138 U. S. 635. In the following states where this question has been considered, the courts have held that the admissibility of evidence is procedural and governed by state law: *Advance* v. *Thompson*, 320 Ill. App. 406, 418, rev. on other grounds, 387 Ill. 77; *Showalter* v. *Western Pac. R. R. Co.* (Cal.) 96 P. (2d) 964, sub. op 16 Cal. (2d) 460, 96 P. (2d) 895; *Joice V. Missouri-Kansas-Texas R. Co.*, 354 Mo. 439, 189 S. W. (2d) 568.

presence of the jury that he would *make "an offer of proof."*

As a matter of fact the court plainly told petitioner's counsel in chambers that he was sustaining the objections to the offered evidence (R. 97) "to the form and *not to the substance.*"

The petitioner asserts (p. 27 of his petition) that *all* of the evidence by which he offered to prove custom and usage was not subsequently received in evidence; that even the Appellate Court could only say, that "*substantially* all of the excluded evidence was later presented to the jury." He fails to point out, however, wherein the evidence was deficient in the respect mentioned.

An examination of the record shows without dispute that the statement of the Appellate Court, above referred to, is in accordance with the record (excluding from consideration petitioner's evidence on direct examination) (R. 57-58; R. 127; R. 261; R. 263, 264; R. 278; R. 280; R. 289; R. 298, 299).

All of which evidence, as the record shows, insofar as it pertained to the customs and usage of the respondent in handling cars at its Altoona classification yard, *was wholly undisputed.*

Under our subsequent proposition 3, we shall demonstrate that the evidence which the petitioner now contends was relevant to prove custom and usage, was in fact irrelevant and incompetent in form to prove such facts. We will also show that each specific series of questions propounded to the petitioner by his attorney, was in fact incompetent to prove any custom and usage. We shall also show, that as a matter of law, the petitioner could not have predicated a legal offer of proof upon the rejected evidence. Under these circumstances, the petitioner having

failed to conform to Illinois legal requirements in making his offer of proof cannot now complain that the court erred in rejecting such evidence.

In petitioner's offer of proof (R. 81) he contended in substance that if the petitioner had been allowed to answer the questions, he could establish the practice of handling cars found unsafe to ride. This practice (according to the petitioner) was, in substance, as follows: When the brakeman found a car unsafe to ride, he notified the pincutter and the pincutter would cut off a second car and tell him to get on the platform of that car. There was not one scintilla of evidence that a box car with snow and ice on top of the car, through custom and usage, or otherwise was considered an unsafe car.

The record shows without dispute that there was nothing defective with the braking apparatus of the car in question, or that the petitioner had any difficulty in stopping the car when it arrived at its destination. The petitioner testified that (R. 91): "After the car was at its destination, *I stopped the car;*" that "after the car had come to a complete stop and was coupled to another standing car, I started to get off. The car that I was coupled on to was a box car" (R. 124-125).

The Appellate Court in its opinion held that there was no evidence which tended to show, "the command or direction given by defendant's conductor to plaintiff to get up on the box car proximately contributed to cause his injuries." The Appellate Court also found that the petitioner did not contend in that court that the "presence of ice and snow is in and of itself any factual basis to support a jury's finding of negligence." It further said:

> "Looking at the facts in the light most favorable to plaintiff they show a direction to get on a car, which the plaintiff did without trouble. Since the

> presence of ice and snow was not negligence and since the original direction of the conductor did not embrace his descent in the manner in which he elected to descend, it cannot be said that the record contains any evidence which tends to show that the command given proximately contributed to cause plaintiff's injuries."

We submit that an analysis of the evidence appearing in the record amply supports the statement of the court in the respect mentioned.

The cases cited by the petitioner under this heading to sustain his contention that the proffered evidence was admissible under the pleadings, are not decisive of any controversial issue. These cases merely state the general rule of law (with which we agree) when proof of habit and custom is proper. The Appellate Court found that there was no dispute as to the custom and usage of the respondent in the handling of its cars at its Altoona classification yard on February 1, 1945.

There is, therefore, no merit to the contentions of the petitioner under his proposition I.

3.

The Appellate Court correctly held that there was no prejudicial error in the admission of the undisputed evidence relating to the method of handling cars by the respondent in its classification yard, from the hump to their destinations on the various tracks.

The petitioner contends under this heading that the court erred in rejecting certain evidence tendered by the petitioner in his case in chief, relating to method of handling the cars in the classification yards of the respondent.

Petitioner says that the court erred in rejecting this evidence (which he says was competent at the time it was

offered) to show the practice or custom of handling cars from the hump to the various classification tracks. He urges in substance that this error was not cured by the subsequent admission of the evidence, either by the defendant, or developed by petitioner's counsel in his cross-examination of defendant's witnesses.

Under this heading the petitioner cites numerous cases to sustain this contention. We have painstakingly examined each of the cited cases. It would serve no useful purpose to analyze each of these cases and to distinguish each case either on the facts or the law. We deem it sufficient to advise the court, that these cases do not reach the questions presently before the court in this petition. Petitioner's cited cases may be divided into three general classes. (a) Cases where the evidence was disputed or was the only evidence in the case on the question involved, (b) Cases in which the offered evidence was corroborative, and (c) Cases where the the offered evidence was cumulative.

The Appellate Court in its opinion considered these classes of cases (cited by petitioner) and held that where "the issues are contested on the proof, the exclusion of cumulative or corroborative evidence, cannot be cured by its subsequent reception." The Appellate Court in considering the classes of cases cited by the petitioner, also held in substance that this rule of law had no application where the evidence on the question of fact sought to be established *was undisputed* (as in the instant case). In pointing out this exception, after stating the rule of law referred to above, the Appellate Court said:

> "If, however, the **fact is not disputed**, the court's initial rejection of the evidence is corrected by the later proof of the **undisputed fact irrespective of the identity of the witness by whose testimony it is proved.**" (Emphasis supplied.)

The Appellate Court found as a fact that:

> "*There was no controversy as to the existence of the custom.* (Emphasis supplied by the court.) The jury could not have escaped believing that **which the defendant freely and unqualifiedly admitted.**" (Emphasis supplied.)

In addition to the cases cited by the Appellate Court in its opinion, to sustain this rule of law, the following Illinois cases might be added thereto: *Van Ameringen* v. *Cohen,* 254 Ill. App. 576, cert. den. 254 Ill. App. XIX; *Senquist* v. *Hardware Mutual Fire Ins. Co.,* 296 Ill. App. 510, 523, aff'd. 371 Ill. 360; *Andrews* v. *City of White Hall,* 184 Ill. App. 298, 302.

It has been unqualifiedly held in innumerable cases that the admission of erroneous or incompetent evidence is not reversible error, where the facts sought to be proven by such evidence, are *subsequently established by undisputed or uncontradicted evidence.*[1]

(a)

Petitioner's offered evidence to prove habit and custom was incompetent to prove such facts in the form tendered. The petitioner is therefore in no position to assert error in this respect.

---

[1] *Neice* v. *Chicago & Alton R. R. Co.,* 254 Ill. 595, 605; *Suchomel* v. *Maxwell,* 240 Ill. 231, 235; *Soibel* v. *Oconto Co.,* 299 Ill. App. 518, 523; *Schillo* v. *City of Chicago,* 326 Ill. App. 423 (Abs.); *Eaton* v. *Thieme,* 15 Cal. App. (2d) 458, 59 P. (2d) 638; *Swarthout* v. *McDonald Mortgage & Realty Co.,* 102 Ind. App. 298, 199 N. E. 467; *Iterman* v. *Baker,* 214 Ind. 308, 15 N. E. (2d) 365; *Shortway Lines* v. *Sutton's Adm'r.,* 219 Ky. 541, 164 S. W. (2d) 809; *Keiger* v. *City of Faribault,* 220 Minn. 89, 18 N. W. (2d) 777; *Jansen* v. *Aholt* (Mo. App.) 189 S. W. (2d) 121; *Harden* v. *Kifer,* 188 Okla. 53, 111 P. (2d) 490; *Thomas* v. *Metropolitan Life Ins. Co.,* 131 Pa. Super 588, 200 A. 210; *Funderbunk* v. *Sovereign Camp W. O. W.,* 179 S. C. 80, 183 S. 462; *Grant* v. *Matson,* 68 S. D. 402, 3 N. W. (2d) 118; *Brotherhood of Loc. Firemen and Enginemen* v. *Raney* (Tex.) 101 S. W. (2d) 863. This appears to be the Federal rule. *William C. Barry Inc.* v. *Baker,* 82 F. (2d) 79; *U. S.* v. *Cole,* 45 F. (2d) 339; *Standard Oil* v. *Neville,* 48 F. (2d) 580; *Puget Sound Nav. Co.* v. *Lavender,* 160 F. 851.

There is, however, in our judgment a more cogent reason why the evidence was properly rejected by the trial court at the time it was offered.

The respondent in the Illinois Supreme Court in its answer to petitioner's petition for leave to appeal[2] to that court urged that petitioner's tendered evidence as to habit and custom did not comply with Illinois procedural requirements; that on such grounds the evidence was properly rejected in the trial court.[3] The Appellate Court in its opinion did not specifically refer to this question. However, this question was before the Illinois Supreme Court.[4]

The petitioner says that his purpose in offering this evidence was to establish the existence of a practice or custom at the particular classification yard to show the regular or usual method of handling the cars over the hump.

On pages 23, 24 of his petition, the petitioner lists alleged instances in which objections were sustained to offers of evidence to prove these facts. At another place in his petition (p. 35) he says the evidence was finally admitted "after being condemned *twelve times.*"

Petitioner's attorney was a capable and experienced trial lawyer. We have no doubt that he was fully cognizant of the rules of evidence requiring the proof of certain facts, in order that evidence of custom and usage be admissible. We also assume that he was cognizant of the Illinois rules of evidence relating to the manner of making an offer of proof.

---

[2] Not included in the transcript of record.

[3] The trial court advised counsel for plaintiff that he was sustaining objections to the offered evidence "as to form and not as to substance." (R. 97.)

[4] On petition for leave to appeal the Illinois Supreme Court searches the entire record to determine if the judgment entered by the Appellate Court is justified by the record. In its review the Supreme Court is not confined to the grounds upon which the Appellate Court based its opinion (*Kamienski* v. *Bluebird Air Service*, 389 Ill. 462, 464).

The record shows that petitioner's counsel made five offers to prove certain facts, which he contended were relevant. The questions which he propounded to the witness (and to which objections were sustained), to establish custom and usage, were in fact incompetent and were erroneous as to form and substance. The court correctly, as a matter of law, sustained the respondent's objection to such questions, and to the alleged offers of proof based upon evidence sought to be adduced by such inquiries.

The Appellate Court in its opinion summarizes the facts which the petitioner contends he offered to prove. The petitioner says that he offered competent evidence to prove these facts, which was rejected by the trial court.

We will demonstrate by the record, that the petitioner did not offer any competent evidence to prove habit and custom, notwithstanding petitioner's assertions in his petition that the offered evidence tended to prove such facts.

Before adverting to the record, in this respect, the attention of the court is first directed to the fundamental Illinois rules of evidence relative to the facts necessary to be proved to establish a custom and usage.

The courts of Illinois have repeatedly held that before evidence of a custom or usage is admissible, certain facts must be shown to establish its existence. (a) It must be a *known custom,* (b) It must be *certain,* (c) It must be *uniform* in its application, and (d) It must have *existed for such a length of time so as to warrant the inference* that the party against whom the right was claimed had knowledge of it. (*Miller Agency Inc.* v. *Home Ins. Co.,* 276 Ill. App. 418; *Kneip* v. *Schroeder,* 166 Ill. App. 215; *Mobile Fruit Trading Co.* v. *J. H. Judy & Son,* 91 Ill. App. 87; *Quin* v. *Heihold,* 100 Ill. App. 320; *American Ins. Co.* v. *France,* 111 Ill. App. 310; *Wilson* v. *Bauman,* 80 Ill.

493; *Papin* v. *Goodrich*, 103 Ill. 86; *Turner* v. *Donovan*, 50 Ill. 85.)

In the *Miller* case (cited above, 276 Ill. App. 418) the court in discussing this question, said (p. 427):

> "A custom or usage to become binding upon the parties must have **antiquity**, as well as **uniformity** and **universality.**" (*Crawford* v. *Clark*, 15 Ill. App. 561.) (Emphasis supplied.)

We submit that an examination of the record clearly demonstrates that the series of questions which were propounded to the petitioner by his attorney, did not establish or tend to establish any facts which would show the existence of a custom or usage of the respondent.

Under the authorities cited above the petitioner should, first, have adduced evidence which would tend to show the existence of a custom and usage in Altoona classification yard on February 1, 1945.

While the petitioner contends that he made numerous offers of proof to establish such custom and usage, the record conclusively shows that he made only five such offers of proof.

The record shows that prior to the first offer of proof, the petitioner was asked the following questions by his counsel (R. 81):

> "Mr. Monek: **Have you ever ridden a car, gone to a brake platform and found the car unsafe to ride?**
> Mr. Costello: That is objected to.
> Mr. Monek: Let me finish my question please.
> Q. **Have you ever gotten on a car to ride it off the hump and found it unsafe to ride?**
> Mr. Costello: That is objected to.
> The Court: Objection sustained.
> The Witness: Yes.
> Mr. Monek: Your Honor, I am going to make an offer of proof. I offer to prove by this witness—"

The court will note that the petitioner was asked if *he* had ever "gotten on a car to ride it off the hump and found it to be unsafe to ride?"

What the petitioner had done in a particular instance did not tend to establish custom and usage for the reason that (a) it had no tendency to show that there was a custom and usage in existence at the particular hump, (b) such custom and usage had been in existence for any length of time; and (c) the respondent had notice of such custom.

It was incompetent to attempt to establish a custom and usage by showing what the petitioner had done on a particular occasion, as these facts (even if proved) did not tend to establish such custom.

In *C. C. C. & St. L. Ry. Co.* v. *Jenkins*, 174 Ill. 398, p. 407, the Supreme Court said:

> "To establish a usage or custom it is not sufficient to prove certain isolated instances. The usage must be positively established as a fact, and not left to be drawn as a matter of inference, from transactions. (27 Am. & Eng. Enc. of Law, p. 728.) A usage which is to govern a question of right should be so certain, uniform and notorious as probably to be known to and understood by the parties as entering into their contract, (*United States* v. *Duval, Gilp.* 336,) and cannot be proved by a single, isolated instance. (*Dean* v. *Swoop*, 2 Binn. 72; see, also, *Janney* v. *Boyd*, 30 Minn. 311; *Taylor* v. *Mueller*, id. 343). So, also, it is held that particular instances of a certain practice in a bank do not establish a usage, (*Allen* v. *Merchants' Nat. Bank*, 22 Wend. 215) nor instances in one or two banks other than the one concerned in the alleged usage. (*Chesapeake Bank* v. *Swain*, 29 Md. 501.) In *Herring* v. *Skagg*, 73 Ala. 446, it was held that a custom is a fact and is as capable of proof as any other fact; that it may be proved by evidence of facts and instances in which it has been acted upon, but is not proved by evidence that it was acted upon

in a few particular instances of dealing, nor is such evidence admissible to establish its existence."

On the second occasion the petitioner's counsel sought to establish custom and usage (so he says) by attempting to show how many cars the petitioner had ridden off the hump "at a time". In this instance the record shows the following (R. 87):

"**Mr. Monek: Mr. Cowher, in riding cars off the hump, how many cars do you ride at a time?**
Mr. Costello: That is objected—
The Witness: One, Two, Three.
Mr. Costello: I move the answer be stricken.
The Court: The answer may be stricken.
Mr. Monek: Your Honor, I will have to make another offer of proof."

For reasons shown above, this question was likewise objectionable as incompetent to establish, or tend to establish a custom and usage existing in the Altoona Pennsylvania yard of the respondent on February 1, 1945.

The record further shows that prior to the third offer of proof, the petitioner sought to prove the same facts which he attempted to prove by his second offer of proof R. 96, 97). In this respect the record shows as follows:

"Mr. Monek: **Have you ridden more than one car joined together off that hump?**
Mr. Costello: That is objected to.
The Witness: Yes.
The Court: Objection sustained.
Mr. Monek: Your Honor, I think that that is very material in this case.
The Court: That is a matter of opinion.
Mr. Monek: Mr. Cowher, would at times two or more cars go to the same destination in a yard?
The Witness: Yes.
The Court: Objection sustained.
Mr. Monek: Was there an objection?
Mr. Costello: Yes, there was an objection. It is the same thing all over again.

Mr. Monek: I think it is competent and I am going to try until it is ruled on.

The Court: I made my ruling to the form, not the substance.

Mr. Monek: I think I have a right to hear the basis of his objection.

The Court: You heard it.

Mr. Monek: I think I have a right to hear the basis of his objection.

The Court: You heard it.

Mr. Monek: I did not hear the basis.

Mr. Costello: It is the same objection I have been making right along.

The Court: The same matter that we discussed.

Mr. Monek: Well, I would like to make an offer of proof on that too."

Prior to his fourth offer of proof, petitioner's counsel asked petitioner the following questions (R. 106):

"Mr. Monek: Your Honor, I am trying to show what his occupation is so that the jury may determine whether or not he can return to work.

The Court: Go ahead.

Mr. Monek: I have to show how he sets brakes and gets on and off cars and the jury has a right to know so they can determine whether he can return to that type of work.

Mr. Costello: I object.

The Court: Objection sustained.

Mr. Monek: I would like to make an offer of proof on that."

The witness was permitted subsequently to testify as to what work he performed in connection with his duties. There could be no question, therefore, as to whether the court erred in the rejection of the offered evidence in this instance. In this respect the record shows as follows (R. 106):

"The Witness: In working as a switchman or brakeman, you throw switches, put on brakes, get on cars that are moving, get off cars that are mov-

ing. You have to climb up on box cars and apply the brake with your left hand, throw your weight against it and set the brakes. * * *"

The fifth offer of proof (R. 109) (in substance the same as the fourth offer of proof) was for the purpose of proving the physical strength required of a brakeman in the performance of his duties. The petitioner in this respect offered the following evidence (R. 108, 109):

"Mr. Monek: Now how many cars does a brakeman ride off the hump at various times?

The Witness: Well—

Mr. Costello: That is objected to.

The Court: Sustained.

Mr. Monek: Your honor, I want to show, I think it is important to show what type of work these brakemen have to do, how many cars they must ride down, so forth and so on, one or more coupled together and so forth and so on. I think that goes to the degree of strength required and so on and so forth.

The Court: Objection sustained.

Mr. Monek: Well, I would like to make an offer of proof on that particular phase then.

The Court: That you may."

The record shows (as we demonstrated above) the kind of work petitioner had to perform in connection with his duties. There could, therefore, be no error in the rejection of this offer.

The preliminary Illinois procedural requirements essential to make a valid offer of proof are well settled. The witness must be placed upon the stand and the examination conducted to a point where it is desired to offer the evidence upon the question and, "then put the question and allow the court to rule upon it, and then offer what was expected to be proved by the witness, **if he was not allowed to answer the question asked.**" (*Chicago City Rail-*

way Co. v. *Carroll,* 206 Ill. 318; *Whyte* v. *Rogers,* 303 Ill. App. 115; *Ritholtz* v. *Andert,* 306 Ill. App. 61.)

It is apparent, under the foregoing authorities, that if the questions propounded to the witness, to which an objection is sustained (prior to the making of the offer of proof), are incompetent or irrelevant; that a valid offer of proof cannot be predicated upon the action of the court in sustaining an objection to the irrelevant and incompetent evidence offered.

We have demonstrated above that all of the questions, in each instance, which petitioner's counsel propounded to the petitioner, were in fact incompetent to prove, and did not tend to prove, any element essential to establish a custom and usage on the part of the respondent.

It will also be noted from the record that the offers of proof made by the petitioner were offers to prove "*what the petitioner did*" at various times and under various circumstances. All of which, we have demonstrated above, did not tend to prove the existence of custom and usage.

The petitioner did not at any time ask the witness if there was a custom or usage in existence under which cars were handled at the Juniata hump, in the Altoona, Pennsylvania Yard of the respondent, on February 1, 1945.

If the petitioner had shown the existence of a custom, it would have been necessary for him to establish by further evidence that, (a), the custom was in existence on the day of the accident, and that (b) the respondent had notice of it. The record shows beyond dispute that the petitioner did not prove any of these essential facts. Neither did he make an offer to prove any such facts. For the reasons indicated the trial court properly rejected the offers of proof, in the form tendered by the petitioner.

The petitioner also suggests that the proof of habit and custom was vital to his theory of the case. This is a mere assertion, without any foundation in the record. The record shows that the petitioner rode the car in question to its destination and that it was coupled onto a standing car without any difficulty. The petitioner had he determined the car was unsafe to ride,[1] ordered it cut off and transferred to the side track, would have encountered the same identical hazards in alighting therefrom, that he did when he attempted to alight after the car had reached its final destination. The proof of habit and custom had no material bearing on the liability of this respondent.

Aside, however, from this view, all the material evidence as to respondent's method of the handling of the cars at the hump was before the jury, and it was not in dispute. The jury could not have been misled or prejudiced by the manner of the admission of such evidence.

It is further suggested that the decision of the Illinois courts on the admissibility of the evidence in question, or the manner in which it was admitted, rested on adequate and independent state grounds; that under such circumstances this court has said it will not review such question.[2]

---

[1] The record contains no evidence which by inference or otherwise tended to show that a car with snow on the top was considered unsafe to ride. The petitioner does not assert that the car was mechanically defective in any respect.

[2] *Herb* v. *Pitcairn*, 324 U. S. 117, 125, and cases therein cited.

4.

The court did not commit error in refusing to give the instruction in question.

(a)

The petitioner contends that the court erred in refusing to give the following instruction (R. 307):

> "If you believe from a preponderance or greater weight of the evidence that the box car in question was at the time in question covered with snow and ice and that defendant knew, or in the exercise of ordinary care should have known that the snow and ice, if any, was there and knew or should have known, that its presence rendered it dangerous for a man to go upon and ride said car; and if you further find from a preponderance of the evidence that plaintiff went upon the box car in question in the course of his employment at the order and direction of defendant's conductor and that said conductor had authority to give such order and direction, if any; and if you further find and believe from the preponderance of the evidence that the accident and injury to the plaintiff was the direct and proximate result, in whole or in part, of obeying the conductor's order, if any, then you should consider *this* together with all of the facts and circumstances proved by a preponderance of the evidence in arriving at your verdict."

The record shows that the petitioner tendered only four instructions, three of which were given by the court.

In petitioner's Given Instruction No. 15, (R. 309) the court instructed the jury that it was the duty of the defendant to exercise ordinary care to furnish the petitioner "a reasonably safe place in which to perform his work."

Petitioner's Given Instruction No. 23 (R. 309) was on the measure of petitioner's damages.

Petitioner's Given Instruction No. 23 (R. 309) authorized the jury to diminish petitioner's damages if it found he was guilty of contributory negligence.

The petitioner offered no instructions on the habit and custom of the railway company in handling of the cars in the switching operation. If he predicated his case on this theory he failed to tender any instruction in this respect.

The petitioner contends that the refused instruction quoted above, was a correct instruction and should have been given. He says this instruction was *approved* in *Berry* v. *Baltimore & O. R. R. Co.*, (Mo.) 43 S. W. (2d) 782.

However, assuming solely for the purpose of argument, that the tendered instruction in the *Berry* case was a correct statement of the law, as applied to the facts in that case, it does not follow, as petitioner urges, that his refused instruction was a correct statement of law, either under the facts in the instant case, or as a matter of law.

The instruction referred to in the *Berry* case (*Berry* v. *Baltimore & O. R. R. Co.* (Mo.), 43 S. W. (2d) 782), was as follows:

> "At the trial, the court overruled a demurrer to the evidence asked by the defendant and submitted the case to the jury on instructions covering the two grounds of negligence mentioned. The only instructions given for plaintiff, other than on the measure of damages, in addition to the formal parts and undisputed facts, required the jury to find 'that the defendant, by its agents and servants (other than the plaintiff) stopped said train near Xenia, Illinois, with the caboose thereof on a trestle, and that the step of said caboose extended out to about the edge of said trestle, so that a person alighting from said caboose would fall from said trestle down about twenty feet and sustain injuries, and that it was dark and

in the night-time; and if you further find that at the time and place where said caboose stopped on said trestle as aforesaid, if you do so find, plaintiff was in darkness of the night-time and did not know and had no means of ascertaining, if you do so find, that said caboose was on said trestle, and that thereafter the plaintiff was ordered and directed to alight from said caboose there, and did, pursuant to said order, step off said caboose and fall about twenty feet, sustaining injuries; and if you further find that the defendant, its agents and employes (other than plaintiff), in ordering plaintiff to alight from said caboose there, if you so find, failed to exercise ordinary care, and that said defendant, its agents and employes (other than plaintiff) knew, or by the exercise of ordinary care on their part would have known, of the aforesaid conditions, and that by reason thereof, if you so find, it was dangerous and not reasonably safe; and if you further find that the defendant, its agents and employes did cause and permit said caboose to stop on said trestle as aforesaid, and that they knew, or by the exercise of ordinary care on their part would have known, that by reason thereof it was likely to cause injuries to plaintiff as aforesaid and that it was dangerous and not reasonably safe, if you do so find; and if you further find that the defendant, its agents and employes (other than plaintiff) were guilty of negligence in stopping said caboose on said trestle as aforesaid, if you so find and in ordering plaintiff to alight from said caboose under the circumstances aforesaid, if you so find, and that plaintiff, while exercising ordinary care for his own safety, if you do so find, was injured as a direct and proximate result of the aforesaid negligence and carelessness on the part of the defendant, its agents and servants (other than plaintiff), then your verdict must be in favor of the plaintiff and against the defendant herein'."

An examination of petitioner's refused instruction shows that this instruction cannot be considered an "approved" instruction on the theory that it is the same or a similar instruction to that considered by the court in the *Berry* case, for the following reasons:

First—Petitioner's instruction is not the same, or even similar, to the instruction given in the *Berry* case.

Second—Petitioner's refused instruction was as a matter of law erroneous in many particulars, as we shall subsequently demonstrate.

Referring to the first of the above stated propositions, petitioner's refused instruction authorized the jury to find the defendant guilty of negligence if the presence of ice and snow on the car "rendered it *dangerous for a man to go upon and ride said car.*"

The petitioner did not charge in his complaint that the presence of ice and snow "rendered it *'dangerous'* for the plaintiff to go upon or ride the car".

The allegations of the petitioner's complaint with respect to the negligent acts charged against the respondent, were as follows (R. 69, Par. 8, Complaint of Petitioner):

"8. Defendant at the time and place alleged and wholly regardless of its duty toward the plaintiff committed one or more of the following acts of negligence and thereby caused the injuries to the plaintiff:

a) It unnecessarily permitted a great amount of snow and ice to be and to remain upon the grab irons and the top of said car where plaintiff had to work when it knew or in the exercise of ordinary care should have known that said ice and snow was there for a long time and that it would endanger plaintiff in the performance of his duties on said car.

b) It failed to use ordinary care to furnish plaintiff with a reasonably safe place in which to work.

c) It failed to use ordinary care to furnish the plaintiff with reasonably safe instrumentalities with which to work.

d) It negligently directed and ordered plaintiff to ride said car when it knew or in the exercise of ordinary care should have known that it was covered with snow and ice and that the presence of said snow and ice coupled with the absence of a

brake platform from which to operate said car increased the hazard and danger to the plaintiff in operating said car.

2) It failed to couple said car to another car with a brake platform from which plaintiff could have operated the hand brake and taken said car to its destination when it knew or in the exercise of ordinary care should have known that to require the plaintiff to operate the hand brake from the roof of said car when it was covered with ice and snow which increased the hazard to plaintiff would endanger his safety."

The complaint in the *Berry case*, in each of the two counts relied upon for recovery, charged the alleged acts of negligence, and also alleged under these conditions that, "it was *dangerous*, and not reasonably safe." It, therefore, appears that the use of the word "dangerous" in the instruction in the *Berry* case was authorized under the pleadings and proof in that case. Plaintiff's use of that word in the instruction under the pleadings and evidence made the instruction clearly erroneous.

The instruction in the *Berry* case after enumerating the facts under which the jury might find the defendant negligent, concluded with the following language:

> • • •" 'and that plaintiff, while exercising ordinary care for his own safety, if you do so find, was injured as a direct and proximate result of the aforesaid negligence and carelessness on the part of the defendant, its agents and servants (other than plaintiff), then your verdict must be in favor of the plaintiff and against the defendant herein.' "

Plaintiff's refused instruction, after enumerating six propositions (which we will later consider) concluded with this language (R. 308):

> • • • *"then you should consider* **this** together with all of the facts and circumstances proved by a preponderance of the evidence in arriving at your verdict."

The plaintiff also omitted from his instruction the words, *"and not reasonably safe"* following the word *"dangerous"* which were included in the instruction in the *Berry* case.

The instruction in the *Berry* case (if it be assumed to be a correct statement of the law), was clearly a preemptory instruction, which apparently contained all the elements necessary to create legal liability on the part of the defendant in that case.

The petitioner in order to avoid the preemptory language of the instruction in the *Berry* case, merely told the jury it could consider "this, together with all of the facts and circumstances, etc."

It is clear beyond any possible logical argument that even if the instruction in the *Berry* case was an "approved" instruction, the petitioner is in no position to urge the correctness of the refused instruction on the basis of what was said in the *Berry* case. Petitioner's instruction was (a) an entirely different instruction, (b) the instruction in the *Berry* case was authorized under the pleadings and proof in that case; and (c) the instruction in the *Berry* case was based upon facts which were entirely different from the facts in this case.

The argument of the petitioner that he was entitled to give this instruction on the theory that the instruction was approved in the *Berry* case is clearly without merit.

(b)

The respondent as to the second of the above stated propositions, (that this instruction was erroneous as a matter of law), will demonstrate that the plaintiff was not entitled to give this instruction under any circumstances.

As we pointed out above the petitioner did not tender any instruction advising the jury as to issues in the case, or concerning the allegations of negligence charged in his complaint; that he tendered only four instructions, three of which were given at his request.

5.

The instruction was erroneous as a matter of law.

(i)

The instruction was unintelligible.

The refused instruction told the jury that if they believed "from a preponderance or greater weight of the evidence," six enumerated findings of fact, which were as follows:

(i) "that the box car in question was at the time in question covered with snow and ice,
(ii) and that defendant knew, or in the exercise of ordinary care should have known that the snow and ice, if any, was there and knew, or should have known that its presence rendered it dangerous for a man to go upon and ride said car;
(iii) and if you further find from the preponderance of the evidence that plaintiff went upon the box car in question in the course of his employment at the order and direction of defendant's conductor
(iv) and that said conductor had authority to give such order and direction, if any;
(v) and if you further find and believe from the preponderance of the evidence that the condition of said car by reason of the presence of the snow and ice, if any, was such that a reasonably prudent person in the position of said conductor would not have ordered plaintiff to go upon the car,
(vi) and if you further find from a preponderance or greater weight of the evidence that the accident and injury to the plaintiff was the direct and proximate result, in whole or in part, of obeying the conductor's order, if any,"

that they should "then consider *this* together with all of the facts and circumstances proved by a preponderance of the evidence in arriving at your verdict."

The word "this" has been defined by the court to be "a demonstrative word referring particularly to what is present or near in place, time or thought or **to something just mentioned**, or to be mentioned." (*People* v. *National Box Co.*, 248 Ill. 141.)

The word "this" used in the instruction could only refer to the sixth of the above enumerated findings which immediately preceded it.

Thus the instruction notwithstanding the six enumerated separate factual findings to be made by the jury directed the jury to consider only the sixth or last, of such findings in arriving at their verdict. The jury was thus left to speculate without any rule of law to guide them, as to what, if anything, they were to consider in connection with the remaining five findings. The instruction in the form tendered was therefore involved, misleading and unintelligible, and the court did not err in refusing this instruction.

It is never error to refuse an instruction which is both involved and misleading. (*Duncan* v. *Kammeier*, 206 Ill. App. 207; *Klusemeier* v. *East St. Louis Bridge Co.*, 210 Ill. App. 537; *Bourland* v. *Louisville & N. R. Co.*, 199 Ill. App. 126; *Conklin Const. Co.* v. *Walsh*, 131 Ill. App. 609; *Busick* v. *Ill. Central R. Co.*, 201 Ill. App. 63.)

(ii)

The use of the word "dangerous" in the instruction was in error.

The instruction purported to tell the jury that they might find that the presence of ice and snow on the top of the car, "rendered it *dangerous* for a man to go upon and ride said car"

This instruction limited the alleged negligence of the respondent to the alleged ice and snow on the top of the car which, "rendered it *dangerous* for a man to go upon and ride said car."

What conditions rendered the car "dangerous" was not defined by this instruction or by any other offered or refused instruction.

The petitioner says the respondent did not furnish him with a reasonably safe place to work, yet the Appellate Court found that the petitioner did not at any time contend "the presence of ice and snow is in itself a factual basis to support a jury's finding of negligence." The petitioner does not here challenge that finding. It is therefore difficult to understand how under such circumstances the mere presence of ice and snow authorized the jury to find its presence was "dangerous."

(iii)

The Appellate Court correctly found that the trial court did not commit error in refusing the instruction.

The Appellate court held the trial court did not err in refusing the instruction. In this connection that court said:

> "The instruction was properly refused on the further ground that there was no evidence which tended to show that the command or direction **given by defendant's conductor to plaintiff to get up on the box car proximately contributed to cause his injuries.** * * * There is no evidence to show that any circumstances or occurrences operated to cause plaintiff's injuries other than the ice on the grab iron and rungs. **It is not contended by plaintiff that the presence of ice and snow is in and of itself any factual basis to support a jury's finding of negligence.** Nor has plaintiff alleged or attempted to prove or argue that it was the duty of the defendant to remove the ice and snow from

the car. Looking at the facts in the light most favorable to plaintiff they show a direction to get on car, which plaintiff did without trouble. **Since the presence of the ice and snow was not negligence and since the original direction of the conductor did not embrace his descent in the manner in which he elected to descend, it cannot be said that the record contains any evidence which tends to show that the command given proximately contributed to cause plaintiff's injuries.** We are of the opinion that under the evidence presented the court properly refused to give the instruction." (Emphasis supplied.)

The foregoing statement demonstrates that the Appellate court did not err in affirming the action of the trial court in refusing petitioner's tendered instruction.

6.

It was a question of fact whether the respondent was negligent in failing to furnish the petitioner a safe place in which to perform his work. The evidence on every material issue of this question preponderated heavily in favor of this respondent. The Illinois courts, therefore, did not err in refusing to set aside the verdict of the jury finding the respondent not guilty.

As has been suggested above, the material issues in this case are divisible into two parts, i. e., (a) the major issue,—was there ice and snow on the car in question, and, (b) the supplemental issue,—was the place where the petitioner alighted from the car properly illuminated.

Without restating the record adverted to above, the evidence on these issues strongly preponderated in favor of the respondent. These facts the petitioner tacitly concedes by his failure to contend either before this court or the Illinois courts, that the verdict of not guilty, was against the manifest weight of the evidence.

All of the evidence on these material issues was before the jury for their consideration. These issues were questions of fact to be determined by the jury, based upon their judgment of the weight of the evidence and the credibility of the witnesses. This court has repeatedly held that under such circumstances it will not disturb the verdict of a jury.[1]

Conclusion.

We suggest that this case was fairly and impartially submitted to the jury without prejudicial error in the record in any of the respects suggested by petitioner.

We further respectfully suggest that there are no prejudicial errors of record in this case which would justify this court in granting certiorari prayed for by the petitioner. The jury saw and heard the witnesses, judged their credibility, the weight of the evidence, and returned a verdict for the respondent. The trial court approved this verdict and overruled petitioner's motion for a new trial.

Both the Appellate and Supreme courts approved the action of the trial court in this respect.

---

[1] In *Tennant* v. *Peoria & P. U. Ry. Co.*, 321 U. S. 29, this court said: (p. 35)

> "The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court which is the fact finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. (Citing authorities.) That conclusion whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh and set aside the jury verdict because the jury could have drawn different inferences or conclusions or because the judges felt that other results are more reasonable."

cf. *Lavender* v. *Kurn*, 327 U. S. 645, 652; *Ellis* v. *Union Pac. R. Co.*, 329 U. S. 649, 652; *Myers* v. *Reading Co.*, 331 U. S. 477, 485; *Wilkerson* v. *McCarthy*, 336 U. S. 53, 62.

It is, therefore, respectfully suggested that the petition for writ of certiorari be denied.

Respectfully submitted,

GEORGE F. BARRETT, AND
THEODORE SCHMIDT,
Attorneys for Respondent,
Pennsylvania Railroad Co.

P. J. CRONIN,
ROBERT E. BARRETT,
JOHN W. COSTELLO,
EDWARD WOLFE,
Of Counsel.

FILE COPY

FILED
SEP 17 1949
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1949.

No. 234

GRANT J. COWHER,

Petitioner,

vs.

THE PENNSYLVANIA RAILROAD COMPANY,
a Corporation,

Respondent.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF.

FRANCIS H. MONEK,
Chicago, Illinois,
Attorney for Petitioner.

EDWARD B. HENSLEE,
WALTER N. MURRAY,
MELVIN L. GRIFFITH,
Chicago, Illinois,
Of Counsel.

CHAMPLIN-SHEALY COMPANY, CHICAGO

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1949.

No. 234

GRANT J. COWHER,

Petitioner,

vs.

THE PENNSYLVANIA RAILROAD COMPANY,
a Corporation,

Respondent.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF.

ARGUMENT.

Respondent's reply brief is ingenious. It does not seek to present this case on its merits as it should have been tried but seeks by arguing certain isolated phases of it to conceal the true issues and rulings of the trial court.

We will not reiterate all we have said in our original petition but will confine ourselves to pointing out a few of the situations which we think respondent has tried to distort or conceal from this Court. We do not abandon any position we took on the trial of this case nor retract anything we said in our petition for certiorari filed here.

On Page 11 of respondent's brief the following statement appears:

> "The court did not comment or state at any time, *in the presence of the jury*, that proof of the custom to be established was inadmissible" (Italics ours).

This statement is written so this Court would get the idea that the trial court never *at any time* said that proof of custom was not admissible. In answer to this we call the Court's attention to the record.

Mr. Monek was starting to prove custom and practice by the plaintiff (R. 81) and Mr. Costello objected. The jury was withdrawn and the offer of Mr. Monek to prove custom and practice was made before the trial judge in chambers (R. 81).

Mr. Costello after this offer was made objected to it and said (R. 83):

> "We are not going to have custom or practice • • • . I contend that it is highly prejudicial because we are only concerned with what happened on the night in question and if there is any question for the jury it is for the jury to determine whether or not on that occasion in question the railroad was negligent. What they do on other occasions, what this one can see from this point of vantage, or what that one can see, is entirely beside the question."

There was some more argument between counsel when the court said (R. 84):

> "If you are charging a custom it would be permissible for you to offer evidence of the custom, but if you aren't charging a custom, then I don't see how you can."

The Court then continues as follows (R. 84):

> "My order is that the testimony be limited to this car, how the brake on this car operated or what he did on this occasion."

After some more argument by both attorneys the Court said (R. 85):

> "Well, at any rate I have indicated my ruling. You can show all these facts and circumstances, the speed and everything else *of this car on this particular occasion.*" (Italics ours.)

The jury was then brought in and Mr. Monek proceeded to put questions to the plaintiff relating to custom and practice in handling cars in that yard. This was objected to by Mr. Costello and the Court sustained this objection (R. 87). Mr. Monek then said:

> "Your Honor, I will have to make another offer of proof."

The Court answered saying (R. 87):

> "We will reserve it for the time being and go on with this car."

All these expressions of the Court show his feelings in the matter and are carried out by his ruling thereafter throughout the case, *before the jury*, when he again and again prevented plaintiff's attorney from introducing evidence of custom and practice as shown in our original brief.

It is true that on each occasion Mr. Monek did not ask *all* the questions necessary to establish custom and practice, but each time he did ask enough questions to establish the fact that the trial court would continue to adhere to his ruling which he had announced in chambers. It would have been folly for him to go on asking questions of the witnesses when the court had already announced his ruling and was adhering to it.

An other attempt to mislead this Court is made on Page 12 of the brief of respondent where it says:

"The Court plainly told petitioner's counsel in chambers that he was sustaining the objection to the offered evidence (R. 97) 'to the form and *not* to the substance.'" (Italics ours.)

It is true that this language was used on another occasion but it had nothing to do with the Court's former ruling on custom and practice. In fact this language was used at another time concerning an entirely different matter. The record is (R. 97):

"Mr. Monek: Mr. Cowher, would at times two or more cars to go to the same destination in a yard?
The Witness: Yes.
The Court: Objection sustained.
Mr. Monek: Was there an objection?
Mr. Costello: Yes, there is an objection. It is the same thing all over again.
Mr. Monek: I think it is competent and I am going to try until it is ruled on.
The Court: I made my ruling to the form, not to the substance."

This colloquy shows conclusively what the Court had in mind when he made this remark as to the basis of his ruling. His ruling on custom and practice was made at a prior time (R. 84) and the jury had been recalled (R. 87). The trial was proceeding under that ruling.

In saying "I made my ruling to the form, not to the substance" the Court was replying to Mr. Monek's statement, "I think it is competent and I am going to try until it is ruled on."

This was in open court before the jury and not "in chambers" as stated in respondent's brief (Page 12). Clearly this ruling applied only to the question asked and the objection raised at that time and had nothing to do with the former ruling of the Court on custom and practice.

Even after *substantially* all of the excluded evidence

was put in the record on the re-cross examination of the defense witness John W. Chatham (R. 263) the Court persisted in ruling out custom and practice (R. 279). A question was asked by Mr. Monek of the defense witness J. E. Makin, who was the yard master at that time:

> "And isn't it customary to allow a man to get up to the brake, test the brake and see if it is safe before he gets off the hump?
> Mr. Costello: I object.
> The Court: Objection sustained."

This ruling could only further convince the jury that the court was still of the opinion that custom and practice had no business in this law suit.

Much time and space in the respondent's brief is devoted to a discussion of the petitioner's refused instruction. They say it is not in harmony with the approved instruction in *Berry* v. *B. & O. R. R. Co.* (Mo.), 43 S. W. (2d) 782 and then proceed to set out in full what it says is the instruction in the *Berry* case.

However, they copy (B27) *the wrong instruction*, taking it from page 776 of that opinion, when the instruction referred to by us is on page 788 of that opinion and reads as follows:

> "If you further believe and find from the evidence that plaintiff went upon such pole in the course of his employment, pursuant to an order or direction of a foreman of the defendant, and that such foreman, in giving plaintiff such order or direction, had authority from defendant to direct and order the plaintiff to go upon said pole as a part of his duties as such employee, and if you further believe and find from the evidence that at the time of such order or direction, if any, the condition of such pole was known, or by the exercise of ordinary care could have been known, to the defendant or its foreman, then your verdict must be for the plaintiff."

Inasmuch as all their argument was based upon the wrong instruction we do not deem it necessary to reply thereto, but direct this Honorable Court's attention to what we have said relative to this instruction in our petition filed herein.

Conclusion.

This case was not fairly and impartially submitted to the jury. There was prejudicial error in the record in the respects suggested by the petitioner. The errors were of such a character that would justify this Court in granting certiorari as prayed by the petitioner. The petitioner was entitled to afair trial. He should have been permitted to introduce the evidence of custom and practice when he offered it. The fact that the trial, appellate and supreme courts of this state have approved this trial is no criterion to go by. They could be wrong. In our opinion they are wrong.

For the reasons given by this petitioner we respectfully insist that a writ of certiorari should be granted and on a final hearing that a new trial be ordered.

Respectfully submitted,

FRANCIS H. MONEK,
Attorney for Petitioner.

EDWARD B. HENSLEE,
WALTER N. MURRAY,
MELVIN L. GRIFFITH,
Of Counsel.